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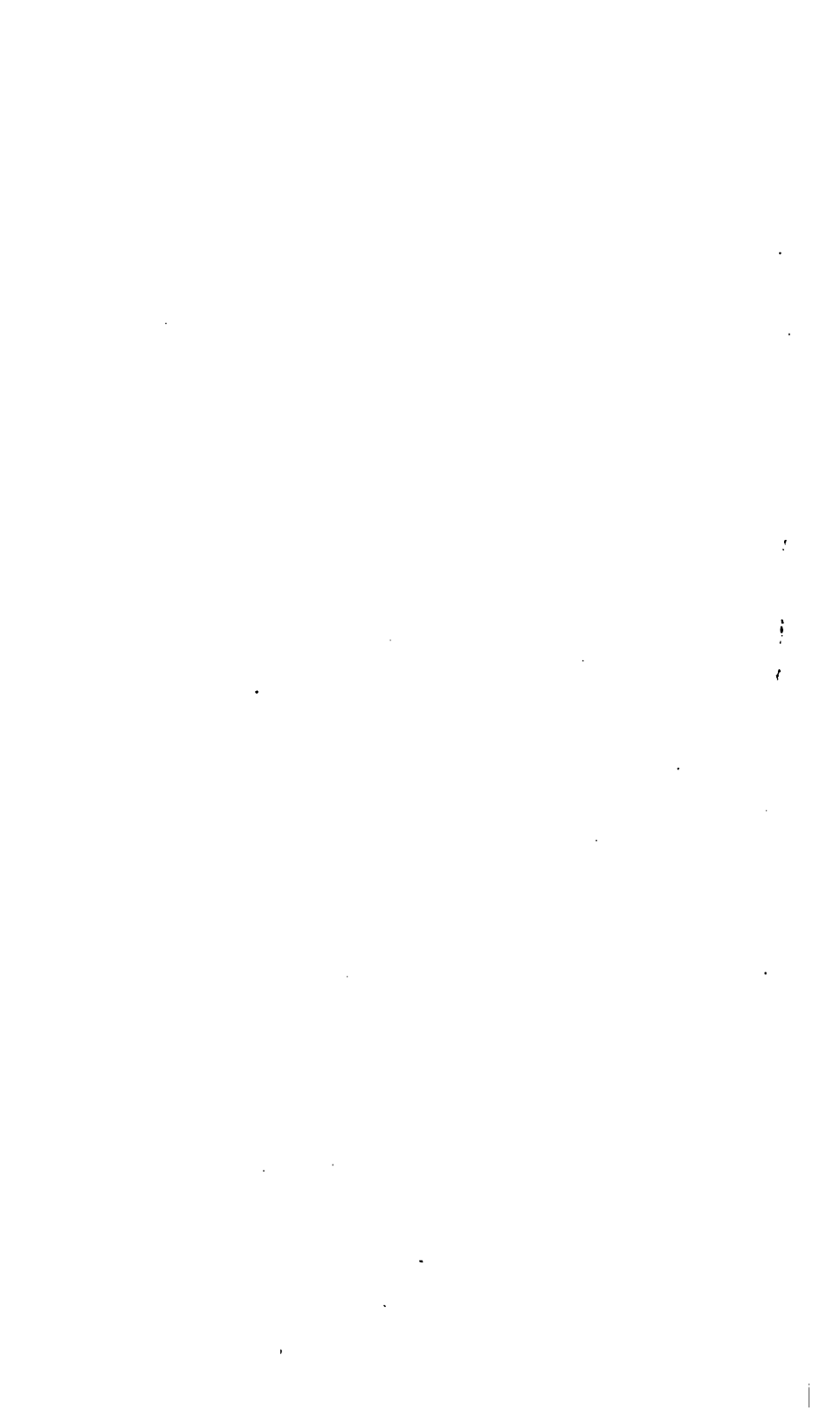


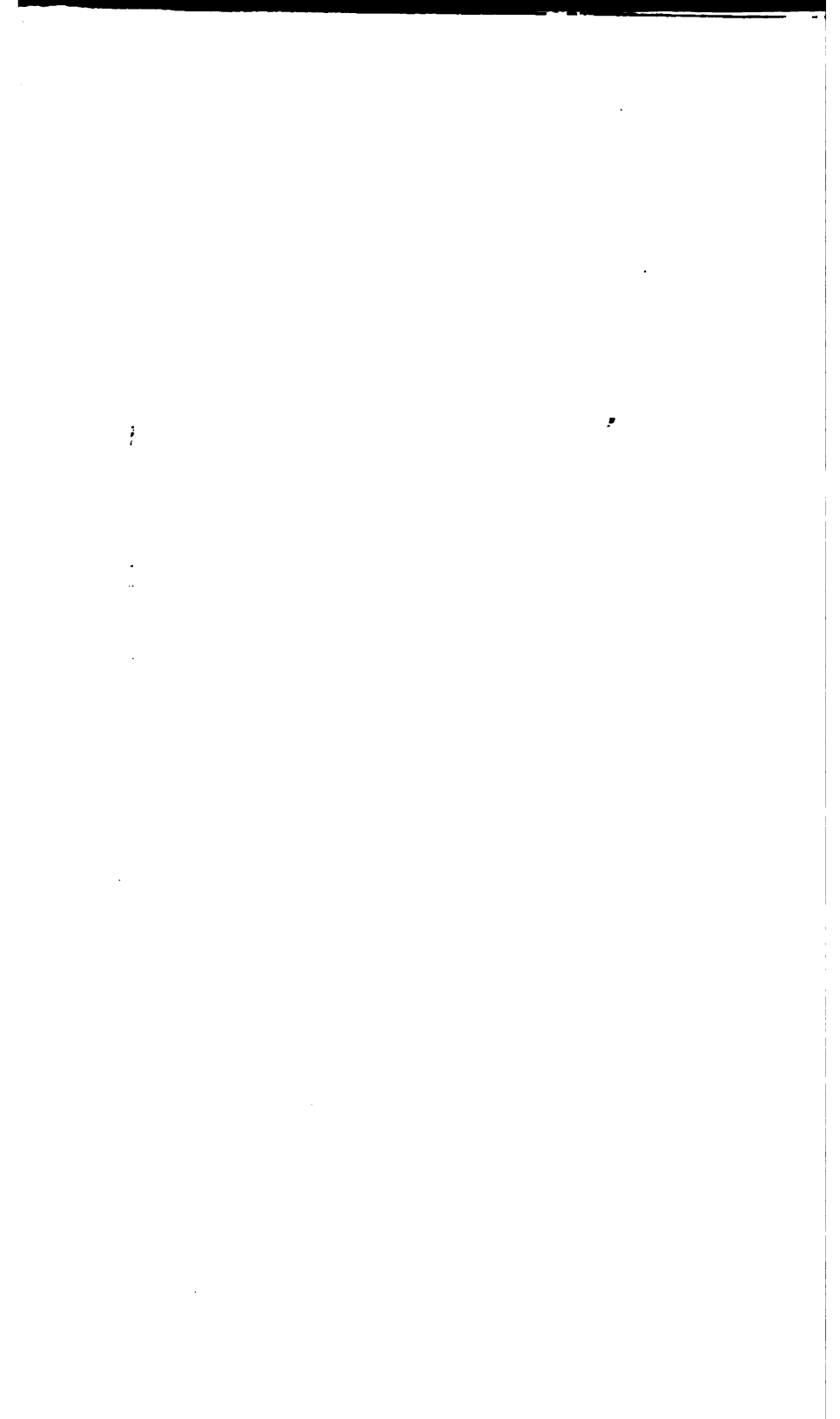












THE  
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. G. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

Vol. XXIII.

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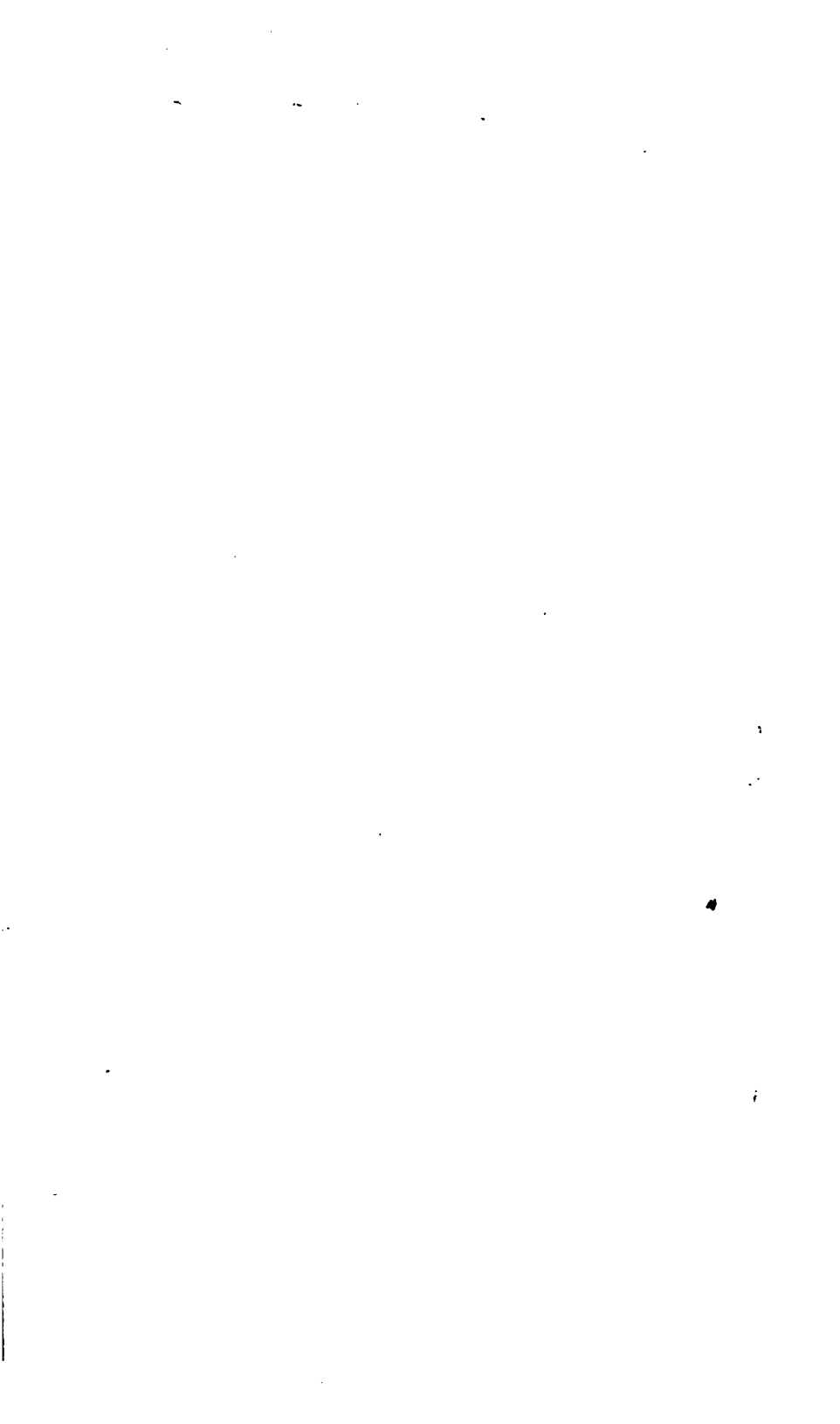
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**AMERICAN STATE REPORTS.**  
**VOL. XXIII.**



**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**NEW HAMPSHIRE.**

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**EDDY v. PHOENIX MUTUAL LIFE INSURANCE CO.**

[55 NEW HAMPSHIRE, 27.]

**INSURANCE — A PAID-UP POLICY IN A MUTUAL LIFE INSURANCE COMPANY IS NOT FORFEITED** by the failure to pay interest on premium notes given on the original policy in lieu of which the paid-up policy had been issued, though the latter declares "that it shall become null and void in case interest is not paid annually in advance on any notes which may be given for any portion of the premium on this policy, and that before payment will be made, any indebtedness of the company on account of this policy will first be deducted therefrom."

**INSURANCE POLICY SHOULD BE INTERPRETED AS THE ASSURED UNDERSTOOD** It and the company intended he should understand it, if all parts of the contract, taken together, admit of such construction.

**INSURANCE — FORFEITURE OF A LIFE INSURANCE POLICY FOR NON-PAYMENT OF PREMIUM** when it becomes due cannot be insisted upon when the assured is entitled to share in the profits, and therefore cannot know what amount he is required to pay, and no notice has been given him of what sum the insurer claims to be due from him.

**INSURANCE — STIPULATIONS FOR FORFEITURE ARE STRICTLY CONSTRUED.** A notice to the assured of the amount claimed to be due from him for premiums must be exact; and if it specifies a sum greater than the insurer is entitled to exact, the failure to pay does not work a forfeiture.

*Leach and Stevens*, for the plaintiff.

*S. G. Lane and W. L. Foster*, for the defendants.

**CLARK, J.** The policy in suit purports to be a paid-up policy in lieu of policy No. 39135, issued September 24, 1869. The contract set forth in the policy is, that in consideration of \$480.25 paid, and of the annual payment of interest on four notes on or before the eleventh day of November in every year during the continuance of the policy, the company insure the

life of James O. Eddy in the amount of \$500, which the company agree to pay according to the terms of the policy, "any indebtedness to the company on account of this policy being first deducted therefrom." The policy contains the following conditions: 1. "In case any note given for the cash part of premium on this policy shall not be paid at maturity, or in case the interest is not paid annually in advance on any notes which may be given for any portion of the premiums on this policy, then, and in every such case, the policy shall be null and void." 2. "If the said interest shall not be paid . . . on or before the date above mentioned, then, if interest has been regularly paid in advance on all premium notes given by the assured, in every such case the said company shall only be liable for the payment of a part of the sum insured, proportionate with the annual payments made, for which a new policy shall be issued if applied for within twelve months, as above specified, and this policy shall cease and determine."

As the policy was a paid-up policy, with no premium to be paid and no premium notes to be given, the conditions contained in it have no application strictly. The four notes outstanding upon which interest was to be paid were overdue premium notes on a former policy, in lieu of which the policy in suit was given; and the case finds that the plaintiff was induced to take out the original policy by representations and assurances that all endowment policies issued by the company were non-forfeiting, and that after two or more premiums had been paid, if he should desire to discontinue further payments, a paid-up policy would be issued on surrender of the original policy, for a proportionate amount of the original policy, according to the number of premiums paid.

A policy issued under such circumstances should be interpreted as the assured understood it and the company intended he should understand it, if all parts of the contract, taken together, admit of such a construction. The company represented that the paid-up policy would be non-forfeiting, and the assured so understood it. It contains a provision for the payment of any indebtedness to the company by deducting it from the amount of insurance secured by the policy, and the failure to pay the interest in advance upon the notes given on the original policy is to be treated as an indebtedness to the company, and not as a forfeiture of the paid-up policy: *Cowles v. Continental Life Ins. Co.*, 63 N. H. 300; *Montgomery v. Phoenix Mut. Life Ins. Co.*, 14 Bush, 59; *Cole v. Knickerbocker*

*Ins. Co.*, 63 How. Pr. 445; *Northwestern etc. Life Ins. Co. v. Little*, 56 Ind. 504; *Ohde v. Northwestern etc. Ins. Co.*, 40 Iowa, 357; *Symonds v. Northwestern etc. Ins. Co.*, 23 Minn. 491; *Hull v. Northwestern etc. Ins. Co.*, 39 Wis. 397; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 17; *Northwestern etc. Ins. Co. v. Fort's Adm'r*, 82 Ky. 269; *St. Louis M. L. Ins. Co. v. Grigsby*, 10 Bush, 310.

Aside from the question whether the policy required a forfeiture for non-payment of the interest on the premium notes of the original policy, the company cannot insist upon a forfeiture upon the facts found in the case. When the insured shares in the profits, and, at the time when the annual premium becomes due, cannot know what amount he will be required to pay the company, the insurers cannot insist upon a forfeiture until they give the insured notice of the amount he is required to pay: *May on Insurance*, 500; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426. Stipulations for a forfeiture are to be strictly construed. It was the duty of the company to give the plaintiff notice of the amount of interest required to be paid; and to entitle them to insist on a forfeiture, the notice must be of the exact sum. According to the contract, the rate of interest to be paid was six per cent. The notice given claimed interest at seven per cent, which was one per cent more than the company were entitled to demand, and the plaintiff's failure to pay the excessive amount demanded did not work a forfeiture of the policy: *Nowell v. Wentworth*, 58 N. H. 319.

Judgment for the plaintiff.

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**INSURANCE — FORFEITURE OF POLICY FOR NON-PAYMENT OF PREMIUMS.** — The failure of the assured to pay a note given by him for an unpaid premium does not deprive him of the right to a paid-up policy to which he was entitled by the original contract: *Southern etc. Ins. Co. v. Montague*, 84 Ky. 653; 4 Am. St. Rep. 218; *Jones v. Life Ass'n etc.*, 83 Ky. 75. The receipt of premiums in arrears by an agent will revive a lapsed policy: *Metropolitan etc. Ins. Co. v. McGrath*, 52 N. J. L. 358. A paid-up policy of life insurance may be forfeited by non-payment of interest on premium notes: *Helman v. Continental etc. Ins. Co.*, 54 Conn. 195; 1 Am. St. Rep. 97, and note; *Fowler v. Metropolitan etc. Ins. Co.*, 116 N. Y. 389.

**INSURANCE — CONSTRUCTION OF POLICY — FORFEITURES.** — Forfeitures are not favored in law: *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note. Insurance policies are to be construed according to the intent of the parties: *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77, and note; *West v. Okimens' etc. Ins. Co.*, 27 Ohio St. 1; 23 Am. Rep. 294; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 36 Am. Dec. 302, and note.

## ALLEN v. COLBURN.

[68 NEW HAMPSHIRE, 37.]

**LACHES.** — THE FAILURE OF THE HEIRS AT LAW OF A DECEDENT TO CLAIM THEIR INTEREST IN HIS ESTATE for twenty-three years, during which time his property has been used and controlled by another as his own, precludes them from afterwards asserting their claims thereto.

*W. W. Bailey*, for the appellant.

*E. S. and H. A. Cutter*, for the appellee.

**ALLEN, J.** At common law, the right and title of the wife's personal estate was in the husband by virtue of the marriage. By the act of 1846 (Laws 1846, c. 327), the wife became entitled to hold and enjoy in her own right property of which she was seised and possessed before marriage, and which, by antenuptial contract, it was agreed should be so held, and any property conveyed, devised, or bequeathed to her, to be so held free from the interference of her husband. And on the death of the wife, intestate, by section 7 of the same act, all personal property so held by her vested in the husband.

The ancestress, Elizabeth Marshall, died intestate in 1862, and her estate must be distributed according to the laws of distribution then in force, unless the claimants, by some act or omission of their own, have waived the right to their shares. By the married woman's act of 1860, the wife was entitled to hold to her own use, free from the control of her husband, all property given, conveyed, bequeathed to, or inherited by her, if not occasioned by the payment or pledge of the husband's property. But this act did not, by retrospective operation, include property received and held by the wife before its enactment, and the title to that part of the property in question, so received by Mrs. Marshall, on her dying intestate, vested at once in the husband, and her next of kin have no claim to it: *Atherton v. McQuesten*, 46 N. H. 205; *Sanborn v. Batchelder*, 51 N. H. 426, 431.

Whether the common-law right of the husband in the property left by his deceased wife was repealed by the act of 1860, and for that reason the five hundred dollars, with its accumulations, received by Mrs. Marshall after that statute was in force, should have been distributed to her next of kin, need not here be considered. Upon her death, in 1862, her husband was appointed administrator, and took possession of her property; and during all the time since, to his death, in 1885, a

period of twenty-three years, the plaintiff and other heirs of the decedent, in full view of the estate, and with knowledge of all facts affecting their interest, including the possession, use, and control of the property by the husband as his own, have made no claim to it, nor any part of it, until after his death. To allow their claim now, after such laches, would be unjust to the representatives of the deceased husband, and inequitable in the highest degree: *Hatch v. Kelly*, 63 N. H. 29.

Decree of probate court affirmed.

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LACHES. — One who has the right or capacity to sue, and neglects to do so for twenty years, is thereby deprived of such right: *Woodstock etc. Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 73, and note. A failure to sue on a bond of indemnity for twenty-three years bars such right: *Thompson v. Smith*, 7 Gratt. 112; 54 Am. Dec. 126, and note. Courts of equity will only grant relief in case the application is made without unreasonable delay: *Great West etc. Co. v. Woodmas etc. Co.*, 12 Col. 460; *Moore v. Silver etc. Co.*, 104 N. C. 534; *Day v. Cole*, 65 Mich. 154.

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## WEEKS v. HARRIMAN.

[65 NEW HAMPSHIRE, 91.]

JUDGMENT RENDERED IN ANOTHER STATE REFUSING TO ALLOW A SET-OFF pleaded by the defendant because of the operation of the statute of limitations of such state is conclusive against the maintenance in this state of an action for the same matters which had been attempted to be used as a set-off.

*J. W. Remick, and Aldrick and Remick*, for the plaintiff.

*H. W. Lund*, for the defendant.

ALLEN, J. The Vermont judgment pleaded here in bar of the maintenance of the action was rendered by a court having jurisdiction of the parties and cause of action, and in the regular course of procedure, upon a plea of the statute of limitations in bar of the plaintiff's right of action. Such a judgment, conclusive against the plaintiff's right of action in Vermont, where it was rendered, is conclusive everywhere, when pleaded in a suit between the same parties and on the same cause of action. The fact that the judgment was rendered upon the plea of the statute of limitations alone does not make it any less conclusive in character. The plaintiff's claim was merged in the judgment by which its further prosecution is barred: *Sanderson v. Peabody*, 58 N. H. 116, 119.

Judgment for the defendant.

**JUDGMENTS OF SISTER STATES, CONCLUSIVENESS OF.** — A court will treat a foreign judgment as would the state where it was rendered: *Griffin v. Eaton*, 27 Ill. 379; 81 Am. Dec. 233, and note. A judgment entered in another state is entitled to full faith and credit here: *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71, and note.

## STATE v. HINMAN.

[65 NEW HAMPSHIRE, 108.]

**CONSTITUTIONAL LAW.** — A statute which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same class or locality are exempt, is unconstitutional.

**CONSTITUTIONAL LAW.** — **LICENSE FEE** cannot be imposed upon persons while others of the same class or profession are exempt under similar circumstances and conditions.

**CONSTITUTIONAL LAW.** — **STATUTE PROHIBITING ANY PERSON FROM PRACTICING DENTISTRY** unless he has received a dental degree from some college or a license from a dental society, but exempting from its provisions persons who have resided or practiced their profession in the town or city of their present residence during all the time since January 1, 1875, or who reside out of the state and are called upon to attend patients within it, is unconstitutional and void, because it discriminates against persons engaged in the same business or profession.

*Calvin Page*, for the defendant.

*Samuel W. Emery*, for the state.

**CLARK, J.** This is an indictment under chapter 132, General Laws, for practicing dentistry without a dental degree or license. The respondent demurred upon the ground that the statute is unconstitutional.

The object of the statute upon which the indictment is founded is to secure the possession of the requisite skill and learning by practitioners of medicine, surgery, and dentistry. The possession of such special qualifications as to knowledge and skill is so essential to the protection of the lives, health, and comfort of the people of the state that it cannot be doubted that it is within the power of the legislature to secure it by the enactment of such reasonable conditions as are calculated to exclude from practice those unfitted therefor: *Hewitt v. Charier*, 16 Pick. 353; *State v. State Med. Ex. Board*, 32 Minn. 324; 50 Am. Rep. 575; *Eastman v. State*, 109 Ind. 278; 58 Am. Rep. 400.

Is the statute repugnant to the federal or state constitution in any of its provisions? It is contended that it is in violation of section 2 of article 4 of the constitution of the United



States, and of section 1 of the fourteenth amendment to the constitution, because it discriminates against persons engaged in the same business or profession, and denies to them the equal protection of the laws; and that it is in violation of article 2, part 1, of the state constitution, which declares that all men have the natural, essential, and inherent right of acquiring and possessing property, and seeking and obtaining happiness.

Section 3 of chapter 132, General Laws, upon which the indictment is founded, provides that "it shall not be lawful for any person who is not duly authorized to practice medicine or surgery to practice dentistry, unless such person has received a dental degree from some college, university, or medical school authorized to confer the same, or shall have obtained a license from the New Hampshire Dental Society." Section 6 provides that "each person receiving a license, upon examination, shall pay for the use of the society granting the same the sum of five dollars; upon diploma, one dollar." Section 8 declares that "the provisions of the preceding sections shall not apply to persons who have resided and practiced their profession in the town or city of their present residence during all the time since January 1, 1875, nor to physicians residing out of the state when called into the state for consultation with duly licensed physicians, or to attend upon patients in the regular course of business."

While the power of the legislature to impose restrictions upon the exercise of certain trades and professions for the protection of the public is unquestioned, it must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. The constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same locality or class are exempt: *Cooley's Constitutional Limitations*, 391. The imposition of special restrictions or burdens, or the granting of special privileges to persons engaged in the same business under the same circumstances, is in contravention of the equal right which all can claim in the enforcement of the laws and in the enjoyment of liberty and the right of acquiring and possessing property.

If the statute had declared that its provisions should not

apply to persons practicing their profession in the city of Concord, such an arbitrary discrimination would be clearly repugnant to the principle of constitutional equality. The exemption of all physicians, surgeons, and dentists residing and practicing their profession in Concord from the burden of procuring and paying for a license, and the subjection of all other persons practicing the same professions elsewhere in the state to the expense of purchasing a license, would be a palpable violation of constitutional rights. The exemption of the statute of persons who have resided and practiced their profession in the town or city of their present residence during all the time since January 1, 1875, or during all the time from January 1, 1875, to January 1, 1879, from its operation, is no less in conflict with constitutional provisions. By an arbitrary test, having no reference to skill, learning, or fitness for the practice of the profession, certain persons are exempted from the payment of a license fee to which others of equal and perhaps superior acquirements and experience are subjected. It is a discrimination founded solely upon the accidental circumstance of residence or of a change of residence, and falls within the prohibition of the constitution.

The village of Penacook is partly within the limits of the city of Concord and partly in the town of Boscawen. Suppose that on January 1, 1875, two persons, neither of whom had received a dental degree, were residing and practicing dentistry in that part of the village of Penacook within the limits of Concord; they continued in practice there until January 1, 1878, when both changed their place of residence, one removing a distance of six miles to the city of Concord, and the other removing a distance of a few rods to the Boscawen portion of the village of Penacook, and both have continued the practice of their profession in their respective places of residence ever since; under the provisions of the statute, the dentist who had removed his residence six miles is not required to procure a license, while the one who has removed a distance of a few rods is compelled to submit to an examination and pay a license fee of five dollars to enable him to continue the practice of his profession, because he changed his residence from Concord to Boscawen.

The statute also discriminates against citizens of other states. It does not apply to persons residing and practicing their profession in the same town or city in this state from January 1, 1875, to January 1, 1879; whereas persons who

have resided and practiced their profession continuously since January 1, 1875, in the same town or city in another state are required, upon removing to this state, to procure a license to practice their profession.

The constitutional objection to the statute is, that it imposes a burden of a license fee upon certain persons, and exempts others of the same class and profession under similar circumstances and conditions: *Soon Hing v. Crowley*, 118 U. S. 703; *Yick Wo v. Hopkins*, 118 U. S. 356.

Demurrer sustained.

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SUBSTANTIALLY THE SAME QUESTION involved in this case was again presented for the consideration of the supreme court of New Hampshire in the case of *State v. Penneyer*, 66 N. H. 113. In the latter case the defendant, being indicted for practicing medicine without a license, moved to quash the indictment. The statute involved and the reasons influencing the decision of the court are fully stated in its opinion, which was as follows:—

“CARPENTER, J. ‘It shall not be lawful for any person to practice medicine, . . . unless such person shall have obtained a license from some medical society organized under the laws of this state. . . .

“‘Every medical society organized under the laws of this state shall . . . elect a board of censors, consisting of three members, . . . which board shall have authority to examine and license persons to practice medicine. . . . The board shall issue licenses, without examination, to all persons who furnish evidence by diploma from some medical school authorized to confer degrees in medicine, . . . when said board is satisfied that the person presenting such diploma has obtained it after pursuing some prescribed course of study, and upon due examination. . . .

“‘Each person receiving a license, upon examination, shall pay for the use of the society granting the same the sum of five dollars; upon diploma, one dollar.

“‘If any person shall practice medicine . . . without being duly authorized as provided in this chapter, . . . he shall be punished by fine of not more than three hundred dollars for each offense.

“‘The provisions of the preceding sections shall not apply to persons who have resided and practiced their profession in the town or city of their present residence during all the time since January 1, 1875, nor to physicians residing out of the state when called into the state for consultation with duly licensed physicians, or to attend upon patients in the regular course of business’: Gen. Laws, c. 132, secs. 1, 2, 6-8.

“The General Laws (by which chapter 18, Laws of 1875, was repealed) took effect January 1, 1879: Gen. Laws, c. 291, secs. 1-14. All physicians, except those who practiced all the time between January 1, 1875, and January 1, 1879, and during that period did not remove from one town to another, are required to obtain a license, and pay therefor five dollars or one dollar, according as it may be issued upon examination or upon diploma.

“The law cannot discriminate in favor of one citizen to the detriment of another. The principle of equality pervades the entire constitution. The Bill of Rights declares expressly that all government is ‘instituted for the general good, for the common benefit, protection, and security of the whole community, and not for the private interests or emolument of any one man,

family, or class of men'; that 'every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property, . . . is therefore bound to contribute his share in the expense of such protection,' and is 'entitled to a certain remedy by having recourse to the laws for all injuries he may receive in his person, property, or character': Bill of Rights, arts. 1, 10, 12, 14. All the declarations of right are imbued with the same spirit. With them the body of the constitution is in full conformity. To secure to all as perfect equality of privilege and of burden as human wisdom permits was the chief end sought by the framers of the instrument. To this all other purposes were incidental and subordinate. 'The Bill of Rights is a bill of their equal private rights, reserved by the grantors of public power': *State v. Express Co.*, 60 N. H. 250. 'The reservations could not be more clearly expressed. If the right of equality is not secured by them, it can never be secured by any written instrument. . . . The legal value of the reservations is in their ability not to suggest or advocate a theory of human rights, but to carry a theory into practical effect, and insure the enjoyment of the rights reserved': *Gould v. Raymond*, 59 N. H. 275.

"All taxation must be equal: Opinion of the Justices, 4 N. H. 565; *Smith v. Burley*, 9 N. H. 423, 437; *Morrison v. Manchester*, 58 N. H. 533, 548, 550; *Eldes v. Boardman*, 58 N. H. 580; *Carpenter v. Dalton*, 58 N. H. 615; *First National Bank v. Concord*, 59 N. H. 75, 77, 78; *Berry v. Windham*, 59 N. H. 238; *Robinson v. Dover*, 59 N. H. 521; *Railroad v. State*, 60 N. H. 87, 94; *Mills Co. v. Location*, 60 N. H. 156; *State v. Express Co.*, 60 N. H. 219; *Society v. Manchester*, 60 N. H. 342, 347; *Curry v. Spencer*, 61 N. H. 624; 60 Am. Rep. 337; *Telephone Co. v. State*, 63 N. H. 167, 169; *Railroad v. State*, 63 N. H. 571, 573; *Boody v. Watson*, 64 N. H. 162; *Holt v. Antrim*, 64 N. H. 284. This is merely an example of the universal equality of right which the constitution secures to all. The legislature cannot, by special act, authorize a particular guardian of a minor to make a valid conveyance of his ward's estate, because the exercise of such a power by the legislature 'is in its nature both legislative and judicial,' and 'under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions': Opinion of the Justices, 4 N. H. 572, 573. For similar reasons the legislature cannot grant a new trial in a particular action. Such an act is 'not to promulgate an ordinance for a whole class of rights in the community, but to make the action of a particular individual an exception to all standing laws on the subject in controversy.' 'An act which operates on the rights or property of only a few individuals without their consent is a violation of the equality of privileges guaranteed to every subject': *Merrill v. Sherburne*, 1 N. H. 199, 212, 214, 215; 8 Am. Dec. 52; *Clark v. Clark*, 10 N. H. 380, 385; 34 Am. Dec. 165. It cannot authorize the foreclosure of a mortgage by a method not applicable to other like mortgages: *Railroad v. Elliot*, 52 N. H. 387, 393, 400; require or empower some towns, and not others, to relieve federal military conscripts from the performance of their public duty by the payment of money; or compel some jurors to perform jury service for less compensation than is paid to others for the same service: *Bowles v. Landaff*, 59 N. H. 164, 194, 195; *Gould v. Raymond*, 59 N. H. 260, 277, 278. No one citizen or class of citizens can by law be charged with the performance of

duties or subjected to burdens not by law made incumbent upon all other citizens in the same circumstances.

"The fourteenth amendment of the constitution of the United States, providing that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws,' adds nothing to the rights and liberties of the citizens of this state. It merely confirms to them by federal sanction the rights secured by the action of their ancestors a century ago. It has wrought no change in the law of the state. An enactment obnoxious to this provision of the national constitution is, in New Hampshire, no more ineffective than it would be in its absence.

"The decisions of the federal court are conclusive on the question of the validity of statutes under the federal constitution, and are authority to be weighed on the question of their validity under the constitution of the state. In *Missouri v. Lewis*, 101 U. S. 22, 31, the court say the amendment 'has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' In *Barbier v. Connolly*, 113 U. S. 31, 52, the court say the Fourteenth Amendment 'undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' It was accordingly held that a municipal ordinance prohibiting washing and ironing in public laundries during certain hours within certain territorial limits was not invalid: See also *Soon Hing v. Crowley*, 113 U. S. 703, 708, 709. But an ordinance regulating laundries, which confers upon the municipal officers an arbitrary power to give or withhold consent for persons to carry on the business without regard to their competency, — which makes arbitrary discrimination founded on difference of race between persons otherwise in similar circumstances, — is a violation of the Fourteenth Amendment: *Yick Wo v. Hopkins*, 118 U. S. 356. In *Hayes v. Missouri*, 120 U. S. 68, it was held that a statute allowing the state in capital cases fifteen peremptory challenges to jurors in cities having a population of over one hundred thousand, while only eight are allowed in other places, is not obnoxious to the amendment. The court say (page 71): 'The fourteenth amendment to the constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' In *Minneapolis R'y Co. v. Beckwith*, 129 U. S. 26, 29, 30, the doctrine of the foregoing

cases is affirmed. 'Equality of protection,' says Field, J., 'implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.'

"The preservation of the life and health of the people is one of the chief ends of government. The power of the legislature to regulate the practice of medicine by general laws applicable to all who engage in it is as unquestionable as its authority to adopt measures tending to suppress the sources of disease, to avert the spread of contagion, prevent the adulteration of provisions, the sale of unwholesome food, and to legislate in various other particulars for the protection of the public health: *Gen. Laws*, c. 111-113, 122, 125-127, 129, 133; *State v. Campbell*, 64 N. H. 402; *State v. Marshall*, 64 N. H. 549; *State v. Hinman*, 65 N. H. 103; *ante*, p. 22.

"The purpose of the statute is to protect the public from the imposture and fraud of quacks and charlatans: *Gage v. Censors*, 63 N. H. 92, 94; 56 Am. Rep. 492. To this end all who practice medicine, and have not either obtained a license or resided and practiced in some one town of the state during the prescribed period, are subjected to a fine. Practitioners are divided into two classes: (1) those who have and (2) those who have not resided continuously in some one town of the state during the four years beginning January 1, 1875. The latter class must, while the former need not, pay five dollars, or one dollar each, as the case may be, for a license, in order to continue their business. If all physicians alike, as well those who have as those who have not resided and practiced during the specified period in a single town, were required to procure and pay for a license, it may be that the statute would be open to no constitutional objection: *State v. Green*, 112 Ind. 462; *State v. Dent*, 25 W. Va. 1. Whether it would or not is not now the question. The present objection is not to the rule of evidence by which the statute requires qualification to practice to be determined. It is not that residence and practice during the specified time in one place is made sufficient evidence of fitness,—equivalent to a diploma,—rendering an examination unnecessary. It is, that of those physicians who are declared by the statute, or under its provisions are found, qualified to practice, some are and others are not subjected to the burden of obtaining a license. Exemption from the burden is made to depend, not upon integrity, education, and medical skill, but upon a continuous dwelling in one place for a certain time. The test is not merit, but unchanged residence. It is an arbitrary discrimination permitting some and forbidding others to carry on their business, without regard to their competency or to any material difference in their situation. For the right to continue the pursuit of his profession, one physician is not, while another, his neighbor, who may be his equal or superior in learning, experience, and ability, is, required to pay five dollars. This is not the equality of the constitution. The magnitude of the unequal burden is not material. If any inequality were permissible, the discrimination might be made prohibitory, and a monopoly of the business given to physicians who have resided in a town or city for a specified time: *State v. Express Co.*, 60 N. H. 219, 263; *McCulloch v. Maryland*, 4 Wheat. 316, 427, 431, 432.

"Indictment quashed."

In *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306, in which the principal case is cited and distinguished, the court decided that the legislature had power to regulate the practice of dentistry and to prescribe the qualifications of those seeking to practice, and that a statute was not uncon-

stitutional, as unduly discriminating between persons or classes, because it exempts those engaged in the practice of dentistry within the state at the time of its enactment from the necessity of obtaining a diploma from a dental college, and requires such diploma from all others. To the same effect is *Goenell v. State*, 52 Ark. 228.

## **EASTMAN v. PROVIDENT MUTUAL RELIEF ASS'N.**

[56 NEW HAMPSHIRE, 176.]

**REFORMATION OF A CONTRACT ON ACCOUNT OF A MISTAKE OF LAW** will be decreed, if it does not express what the parties intended it should, owing to their mutual misapprehension of the legal effect of the language used therein.

**PRINCIPAL AND AGENT.** — ONE ADOPTING AND RECEIVING THE BENEFITS OF THE REPRESENTATIONS of another must accept their burdens.

SUIT in equity to reform a certificate of membership in a life insurance association issued to one Gigar. The application for the policy was made to defendant's clerk, who was also one of its trustees, authorized to approve applications. The applicant asked this clerk what would be the effect if no beneficiary were named in the certificate, and on being informed that it would then be payable to his administrator as a part of his estate, replied that was what he desired. The certificate was therefore left in blank, instead of making it payable to his administrator. The defendants pleaded in bar a judgment at law between the same parties. The plaintiff was the administrator of Gigar, and was ignorant of the conversation between the decedent and the clerk until the present suit was commenced.

*Sanborn and Hardy*, for the plaintiff.

*Daniel Barnard and S. B. Page*, for the defendants.

CARPENTER, J. In receiving the application, Rogers represented the defendants. Both parties intended to make the benefit payable to Gigar's administrator. That it was not made payable to him was due to their mutual misapprehension of the legal effect of the language used in the certificate: *Eastman v. Provident etc. Ass'n*, 62 N. H. 555. Equity requires an amendment of the writing that will make the contract what the parties supposed it was and intended it should be, although their mistake is one of law and not of fact: *Kennard v. George*, 44 N. H. 440, 446; *Leach v. Noyes*, 45 N. H. 364, 367; *Brown v. Glines*, 42 N. H. 160; *McCone v. Courser*, 64 N. H. 506, 508;

*Northrop v. Graves*, 19 Conn. 548; 50 Am. Dec. 264; *Stedwell v. Anderson*, 21 Conn. 139; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517, 529.

If Rogers had in fact no authority to receive the application, the result is the same. By issuing the certificate, the defendants ratified his action in taking the application. They received the benefit resulting from the payment by Gigar of his admission fees and assessments. They cannot adopt the part of Rogers's doings beneficial to them, and reject the rest. With the benefit they must accept the burden. They are chargeable with knowledge of Rogers's representations, and with notice of all material facts known to him: *Hovey v. Blanchard*, 13 N. H. 145, 149; *Beckwith v. Baxter*, 8 N. H. 67.

A certificate may properly be made payable to a member's administrator. Such an appointment is not inconsistent with the declared object of the association. It may be that by making it so payable, a member can, as effectually as otherwise, secure assistance and relief to his beneficiary. His creditors may be the persons for whom he wishes to provide.

Whether the judgment at law, rendered long before the plaintiff discovered the facts upon which his present claim for relief is founded, is a bar to this action (*Sanger v. Wood*, 3 Johns. Ch. 416; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175) is a question which need not be determined. The judgment may be vacated upon the plaintiff's motion in the trial court, and thereupon there will be a decree for the plaintiff.

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**EQUITY — REFORMATION OF CONTRACTS.** — A court of equity will reform a contract where it is shown that, by some mistake, it does not express the intention of the parties: *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232. A mistake of law will be relieved against in equity, where it is gross and palpable: *Dill v. Shahan*, 25 Ala. 694; 60 Am. Dec. 540, and note. Equity will relieve against a mistake of law, where one has relied upon the representations of another upon whom he had a right to rely and was deceived: *Tompkins v. Hollister*, 60 Mich. 470.

**PRINCIPAL AND AGENT — RATIFICATION.** — A principal ratifying the contract of his agent adopts it *in toto*; he cannot ratify the part beneficial to him and reject that which is injurious: *Taylor v. Connor*, 41 Miss. 722; 97 Am. Dec. 419, and note; *State v. Harrington*, 100 Mo. 170. Therefore, by adopting the contract of a self-constituted agent, the principal becomes liable for the frauds and misrepresentations of such agent committed or made within the scope of his assumed authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note.



## TIBBETTS v. HORNE.

(66 NEW HAMPSHIRE, 242.)

**FIXTURES BECOME PART OF THE REALTY SO AS TO PASS TO A BONA FIDE PURCHASER** thereof who has no notice of the interest of a third person therein.

**AGREEMENT THAT FIXTURES SHALL RETAIN THE CHARACTER OF PERSONAL PROPERTY** cannot be enforced against a *bona fide* purchaser or encumbrancer of the realty having no notice of such agreement.

**FIXTURES. — MORTGAGEE OF CHATTELS, WHO AUTHORIZED THEM TO BE ANNEXED TO THE REALTY,** cannot enforce his mortgage against a subsequent *bona fide* mortgagee of such realty having no notice of the first mortgage.

**FIXTURES. — RECORD OF A MORTGAGE OF CHATTELS** which are subsequently annexed to the realty does not, after such annexation, give it any notice to a purchaser or mortgagee of such realty of the rights of the holder of the chattel mortgage.

SUIT to enjoin the removal of a steam-boiler, smoke-stack, engine, and other fixtures, being part of certain realty which the plaintiff held under mortgage from the owner thereof. The defendant claimed under a prior mortgage including the same fixtures, but which was given before they had been annexed to the land, and was recorded as a chattel mortgage only, and the defendants knew when they took their mortgage that the chattels described therein were to be put in a mill, and thus made part of the realty.

*W. S. Pierce*, for the plaintiff.

*H. V. Moore and J. A. Edgerly*, for the defendant.

DOE, C. J. "There is no principle of public policy to be subserved by fostering the claim of one man to the enjoyment and exercise of a right and interest in and over the real estate of another, at variance with the record title and apparent ownership. But on the other hand, the policy of the law of this state is, that the public records . . . should show the true state of the titles. . . . Whatever may be the rights or the nature of the interest in respect to such property [buildings and other structures placed by A on land of B] as between the original parties to the contract, . . . it seems to be well settled that a building erected as the one in question was would become a fixture and a part of the freehold, so as to pass by the deed of the owner of the land to a *bona fide* purchaser without notice. This doctrine has been fully settled in Connecticut: *Prince v. Case*, 10 Conn. 375; 27 Am. Dec. 675. To hold a different doctrine would always leave the purchaser in

doubt as to the true state of the title to the property which he was purchasing, or the nature and extent of the claims which third persons might have upon it. The . . . records would give him no light upon the subject. The principal value of the property might be in the buildings, and the purchase made solely with reference to them, and yet, after the bargain was completed and the consideration paid, he might find that a third party owned the buildings": *Powers v. Dennison*, 30 Vt. 752, 756, 757.

"The defendant Root must have understood, when he sold the property to Shants & Co., that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it must necessarily be annexed to the realty substantially in the manner in which it was, and thereby become apparently a parcel of the realty. What he knew, or had reason to suppose, and did suppose, was to be done with the property, he must be taken to have consented to, as he did not object. Root, therefore, having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled, and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor": *Davenport v. Shants*, 43 Vt. 546.

"The policy of our law is, that titles to real estate shall appear upon record, so that all may in this way be informed where the legal estate is. But were this new mode of conveyance to prevail, encumbrances might frequently be found to exist, against which no vigilance could guard, no diligence protect. Our records would be fallacious guides; and when we had gained all the information they could give, we should remain in doubt as to the title. It is much better to leave those who had ventured to rely upon the word or honor of another, to resort to that word or honor for their redress, than to suffer a person who had resorted to the official register to be defeated by secret claims of this kind. The law cannot prefer the claims of those who take no care of themselves to those who have faithfully used all legal diligence. If a loss is to be sustained, it is more reasonable that he who has neglected the means the law put into his power should suffer,

rather than he who has used those means": *Prince v. Cass*, 10 Conn. 375, 381; 27 Am. Dec. 675.

In *Ford v. Cobb*, 20 N. Y. 344, 350, 351, the court says: "The recovery [in *Mott v. Palmer*, 1 N. Y. 564] could be sustained only on the assumption that fences were *prima facie* parcel of the freehold, but might legally become personal property by force of such an agreement as was proved in the case. . . . It is conceded that there must necessarily be a limitation to this doctrine, which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy. Thus a house or other building which, from its size, or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall so as to be essential to its support, it is impossible that they should, by any arrangement between the owners, become chattels. . . . The question in the present case, therefore, is, whether the method in which these salt-kettles were affixed to the freehold was such that they can still be claimed as chattels, upon the principle of" *Mott v. Palmer*, 1 N. Y. 564, and *Godard v. Gould*, 14 Barb. 662, "or whether they are to be considered as real property within" *Fryatt v. Sullivan Co.*, 5 Hill, 116.

"It is said that the execution . . . of a chattel mortgage upon it [boilers, engine, shafting, and gearing], before it was placed in the mill, would be sufficient to preserve its personal character. . . . A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished, and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages, so that the creditors can despoil the house to obtain their possession, or compel the owner to pay this value? I take it they are not": *Voorhees v. McGinnis*, 48 N. Y. 278, 287.

"Upon the question whether the character of property can

be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of the authorities; but we regard the better opinion as being that such a purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles": *Hunt v. Bay State I. Co.*, 97 Mass. 279, 283.

In *Haven v. Emery*, 33 N. H. 66, 68, 69, the plaintiffs delivered iron rails to a railway company under a written agreement that the title should remain in the plaintiffs until they were paid. The defendants were mortgagees of the road. In the opinion, the court says: "As between the parties to the contract, the intention is plain that the property should not vest in the road until the iron was paid for; and that intention will prevail between the parties, unless the laying of the rails in the track necessarily made them an intrinsic and inseparable part of the road in spite of the agreement which reserved the property in them to the plaintiffs. . . . The rails were laid, according to the provisions of the agreement, in a particular part of the track, and that part designated by a written certificate; there is therefore no difficulty in tracing and identifying the iron which the plaintiffs claim. It is not like a case where bricks or nails or other materials are used in the construction of a house, and so incorporated with the building that they cannot be separated and traced: *Cross v. Marston*, 17 Vt. 540; 44 Am. Dec. 353.

"We see nothing in the way in which the rails are annexed to the road, or in the manner in which they are used upon it, that incorporates them more essentially with the road than in the case of a house or a fence set on land of another, with his assent, and under an agreement that the house or fence shall remain the personal property of the original owner. And a house built on land of another, or a fence set on his land, with his assent, and under an agreement that the house or fence shall remain the personal property of the party who places it on the land, does not become annexed, in law, to the land. The agreement of the parties in such case supersedes the general rule of the law.

"As between the parties, then, to this contract, we are of opinion that the rails remain the property of the complainants. Has the right of the complainants been divested or affected by the mortgage to the trustees for the bond-holders? . . . There are some cases which might seem to carry the idea that a purchaser of land would be bound by an agreement of the seller, which gives to what would otherwise be part of the land the character of personal property, and vested the title to it in another, though the purchaser had no notice of the agreement: *Mott v. Palmer*, 1 N. Y. 564. We are not yet prepared to acquiesce in such a doctrine. Primarily, and in the absence of notice to the contrary, the purchaser would seem to have a right to suppose that he was buying with all the incidents and appurtenances which the law, as a general rule, annexed to his purchase; and we should hesitate before we held that he could be affected by a private agreement not brought to his knowledge, which changed the natural and legal character of the property."

In *Cochran v. Flint*, 57 N. H. 514, 545, it was said that the consent of a conditional vendor of saw-mill machinery that it should be affixed to real estate in such way that it would pass by a deed of the land, if it belonged to the land-owner, ought to be inferred from the nature of the thing and the ordinary mode of its use; but the inferred consent was held to be, that it should be affixed to the mill of the conditional vendee, and not to a mill of a third person or a mill previously mortgaged to a third person. The view that a purchaser of land has a right to suppose he is buying with all the incidents and appurtenances which the law, as a general rule, annexes to his purchase was apparently accepted in *Corey v. Bishop*, 48 N. H. 146, 150; was expressly approved in *Carroll v. McCullough*, 63 N. H. 95, 96; and was the basis of the decision in *Mott v. Palmer*, 1 N. Y. 564. But the question against whom this right operates is one on which the authorities are not agreed. As against Waterhouse and Frost, who mortgaged machinery to the defendant when it was personal property, the defendant would claim that he had a right to suppose that its legal character would not be changed by its annexation to the mortgagors' mill. As against the same mortgagors, the plaintiff, a mortgagee of the land and mill, had a right to suppose the machinery was a part of the mill, and the mill a part of the land. Between some persons, the machinery might be personalty; between others, it might be realty. Be-

tween the defendant, a mortgagee of chattels who authorized their annexation to the mortgagors' mill, and the plaintiff, a subsequent mortgagee of the mill who had no notice, actual or constructive, that the defendant claimed a lien on an apparent part of the mill, the question of right is determined by the registry law.

The defendant, as mortgagee of chattels, has the rights of a purchaser holding a recorded title of personalty. The plaintiff, as mortgagee of the land, has the rights of a purchaser of real estate. The public records of chattel mortgages and land titles are an important protection of purchasers. Constructive notice is not given by the record of a chattel mortgage in the county registry of deeds, or by the record of a realty mortgage in the town clerk's office. Before taking a mortgage of the land, the plaintiff was not bound to examine the record of chattel mortgages for the title of machinery that was annexed to the land in a manner that made it apparently as much a part of the land as the removable doors and windows of the mill. The defendant, being bound to know this, should have taken a mortgage of the land, or other security consistent with the safety intended to be given to innocent purchasers by the registry law. By taking no mortgage of the realty, of which, with his assent, the machinery became an apparent part, he gave Waterhouse and Frost apparent authority to convey the machinery as realty. The purpose of the registry law would be defeated, if the county record could not be relied upon in such a case by a subsequent purchaser having no notice of a defect in the apparent title. The town record not being constructive notice of such a defect, the defendant's chattel mortgage became a secret claim when the annexation of the machinery to the land had referred all inquiries to the registry of land titles for information.

Decree for the plaintiff. \_\_\_\_\_

**FIXTURES—EFFECT OF CONTRACT WITH RESPECT TO, AS UPON A MORTGAGEE OR INNOCENT PURCHASER WITHOUT NOTICE.**—The character of property, as real or personal, may be fixed by contract with the owner of the real estate when the article is placed in position, but such contract cannot affect the rights of a mortgagee or an innocent purchaser without notice: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 225; *Stillman v. Flenniken*, 58 Iowa, 450; 43 Am. Rep. 120. But compare *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 389.

## AYER v. WEEKS.

[65 NEW HAMPSHIRE, 268.]

**JURISDICTION—DOMICILE.** — FOR THE PURPOSES OF JURISDICTION and judicial administration, a person must have a domicile somewhere, and a domicile once existing continues until another is acquired elsewhere. **DOMICILE IS NOT DESTROYED BY LEAVING A STATE,** intending never to return, until another domicile is acquired in some other place.

**PROCEEDINGS in insolvency.** The controversy was between the creditors of the defendant Weeks who attached his property October 5, 1888, and other creditors who filed a petition in insolvency against him February 1, 1889. It was claimed that at the time of the commencement of the insolvency proceedings against him, Weeks was not a resident of the state so as to give its courts jurisdiction over him, and therefore that such proceedings were void. He was a resident, doing business at Great Falls, in the state of New Hampshire, until October 5, 1888, at which time he, taking his family and all his household goods, left the state and had not since returned. There was offered in evidence at the trial a document signed by Weeks, in which he stated his residence at Somersworth, New Hampshire, and his absence temporary, and that he intended to return. If this document was competent evidence, the finding of the trial court was, that Weeks continued to be a resident of New Hampshire; but if it was not competent evidence, then the finding was, that he left New Hampshire with an intention not to return, but that he had not acquired a domicile or residence elsewhere.

*Russell and Boyer*, for the appellants.

*Mr. Matthews*, for the appellees.

**CLARK, J.** The case raises a question of jurisdiction, which depends upon whether Weeks, the debtor, had a legal residence in Somersworth when the insolvency proceedings were instituted. This is mainly a question of fact: *Foss v. Foss*, 58 N. H. 283.

In a proceeding against Weeks, the paper offered in evidence would be admissible as containing admissions made by him. But although Weeks's name appears upon the record, he is in no sense a party to the controversy between the attaching creditors and the petitioning creditors in the insolvency proceedings, and his admissions or agreement to abide the orders and decrees of the insolvency court could not confer jurisdiction if

it did not otherwise exist. As to the plaintiffs, the paper is merely a statement of declarations made by Weeks since the controversy arose, relating in part to past transactions and in part to his present and future purposes. Declarations, written or verbal, are sometimes received in connection with acts done, as explanatory of such acts, and on questions of residence or domicile as evidence of intention, but in such cases the declarations, to be admissible, must have been made in the ordinary course of business at the time when the party had no interest to make evidence, and before any controversy: *Doe v. Arkwright*, 5 Car. & P. 575; *Thorndike v. Boston*, 1 Met. 242, 247. We think the document was not competent evidence on the question of Weeks's residence.

But excluding the evidence, upon the facts found, the legal residence of Weeks was in Somersworth. Although the words "residence" and "domicile" are not always convertible terms and have not always precisely the same meaning, we are of the opinion that the residence upon which jurisdiction depends, under the insolvency statute, is a legal residence equivalent to domicile. And whatsoever rule may be adopted in cases involving questions of pauper settlement, voting, and taxation, the principle is well settled that for purposes of jurisdiction and judicial administration a person must have a domicile somewhere, and that he can have but one, and therefore a domicile once existing continues until another is acquired elsewhere. The case shows that Weeks's domicile was in Somersworth, and the fact is found that he had not acquired a domicile or residence elsewhere. The fact that he left Somersworth with the intention never to return did not destroy his domicile there. Until he had gained a domicile elsewhere, he remained a resident within the jurisdiction of the insolvency court, and liable to be proceeded against in insolvency: *Cobb v. Rice*, 130 Mass. 231, 234.

Appeal dismissed.

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**DOMICILE — JURISDICTION.** — For the purpose of jurisdiction every person must have a domicile, and a domicile once acquired continues until a new one is acquired: *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502, and note with a number of cases collected on each point.



## MORRISON v. CITIZENS' NATIONAL BANK.

[55 NEW HAMPSHIRE, 253.]

**SUBROGATION.** — A SURETY'S RIGHT TO SUBROGATION TO SECURITIES held by his creditor is subordinate, and not superior, to the rights of the latter; he has no right to be put in a better position than his creditor, and cannot have the benefit of a security without assuming the burden to which it is subject.

**INDORSER.** — WHERE A CREDITOR HOLDS SEVERAL DEMANDS against the principal debtor, under all of which attachments have been issued and levied, he has no right to insist that the creditor shall first apply the proceeds of the attachment to the satisfaction of the demand secured by the indorsement.

**INDORSEMENT — APPLICATION OF PAYMENTS.** — Where a creditor has several demands against the same debtor, one of which is secured by an indorsement, and he has procured attachments to be issued and levied upon all the demands, he has the right to apply the proceeds of the attachment to the satisfaction of the demands not secured by the indorsement, and then seek satisfaction, if necessary, from the indorser.

**SURETY HAS NO RIGHT TO REQUIRE THE CREDITOR TO SATISFY HIS DEMAND OUT OF THE PRINCIPAL'S PROPERTY,** rather than out of that of the surety.

*F. N. Parsons, Chase and Streeter, and C. O. Rogers, for the defendants.*

*C. B. Hibbard and S. S. Jewett, for the plaintiff.*

CARPENTER, J. The case comes up on a demurrer to the plaintiff's bill, with an answer and an agreement that "the allegations of the bill and answer are to be taken as facts, except where it is otherwise specifically agreed." It is considered as if all the undisputed facts were alleged in the bill. Upon the whole case, some of the material facts are left in doubt. The view of them most favorable to the plaintiff is this: April 12, 1881, the defendant bank brought against Dearborn, — 1. An action to recover a promissory note on which the plaintiff was liable as indorser, and caused Dearborn's property to be attached; 2. Several other actions on unsecured demands in which the same property was attached subject to the former attachment; and 3. An action against the plaintiff as indorser. The property attached was sold on the writs by consent of the parties, and the avails held by the officer for application according to law: Gen. Laws, c. 224, secs. 19, 38. October 5, 1881, the bank obtained judgment in all the suits. The avails of the attached property were insufficient to satisfy the judgments. The bank placed the executions issued on the judgments founded upon their unsecured

demands in the hands of the officer, who, within thirty days after the judgments were rendered, and (as the plaintiff says) on the third day of November, 1881, by the bank's direction, applied upon them the avails of the attached property, leaving them partly, and the judgment on the indorsed note wholly, unsatisfied. On the twenty-fifth day of March, 1882, the plaintiff, in ignorance of the foregoing facts, except of the action against himself, paid the judgment against him, and by his bill seeks to recover of the bank the amount so paid.

It is assumed, without inquiry, that the plaintiff stands in the position and has all the rights of a surety, though, so far as appears, he indorsed the note and procured it to be discounted by the bank in the ordinary course of business: *Duncan v. Bank*, 11 Ch. Div. 88; 6 App. Cas. 1; *Hurd v. Little*, 12 Mass. 502; *Pitts v. Congdon*, 2 N. Y. 352; 51 Am. Dec. 299. A surety, upon payment of the debt, may take an assignment of the creditor's judgment and execution, or of his pending action against the principal, and, for his own benefit, prosecute the action against a defense made by the principal's subsequent attaching creditors, levy the execution upon the property attached, or by suit in the attaching officer's name recover it of the receptor: *Edgerly v. Emerson*, 23 N. H. 555; 55 Am. Dec. 207; *Brewer v. Franklin Mills*, 42 N. H. 292. In both of these cases the assignment was voluntarily made by the creditor, who in neither case had any interest in or claim upon the property attached, except for the security of the debt paid by the surety. Though the question has never been determined in this state, it may be that equity would compel the creditor to make the assignment, or would subrogate the surety to his rights without an assignment in cases of this character. The subsequent attaching creditors and the receptor are not injuriously affected by the subrogation; they remain in the same position they would occupy if, without the intervention of the surety, the creditor pursued the action and made the levy, and no one else has apparently any cause to complain. Whether the surety, on payment of the debt, would be entitled to a like assignment of or subrogation to the rights of a creditor who has on the same property subsequent attachments for the security of other demands which it is insufficient to satisfy, so that either he or the surety must suffer loss, is a different question.

The plaintiff has no reason to complain of the agreement between the two banks. As to him, his case stands as if all

the sued demands against Dearborn were the property of the defendant bank. Dearborn's property was insufficient to satisfy all of them. As between him and the bank, it was immaterial which of the attachments was first. By them the bank acquired the legal right to apply the attached property on their judgments, not merely in the order of the attachments, but in such order as they pleased. They could apply it on the judgment in the last as well as in the first attachment suit, or *pro rata* on all the judgments, or in such other manner as their interest required. This right of appropriation was a valuable part of their security. It is as if Dearborn had delivered the property to the bank in pledge, with express authority to sell it and apply the proceeds in satisfaction of such of their claims as they might see fit; or as if he had given the bank a mortgage of the property to secure all their demands, without stipulating for its application on any one of them in preference to another. The plaintiff, by paying the debt on which he was liable, could not deprive the bank of the right to apply the property, at their election, on the other debts. In order to entitle himself to the benefit of the security, he was bound to pay all the debts for the payment of which it was held by the bank: *Gannett v. Blodgett*, 39 N. H. 150, 153, 154, and cases cited. The assumption that the plaintiff had a lien on Dearborn's property superior to the bank's second attachment has no foundation in law or in fact. He had, in truth, no lien by attachment or otherwise, but merely the equitable right to acquire by subrogation the security obtained by the bank by attaching that property. If this right of acquisition could properly be called a lien, it had no priority over the attachment lien held by the bank. The equitable right of the bank to the application of Dearborn's property to the satisfaction of their unsecured claims against him was, at the least, equal to that of the plaintiff to have that property appropriated to the payment of the debt for which he was Dearborn's surety. By the attachment, the bank acquired, in addition, the legal right. "When two or more have equal claims in equity, and one has the legal title, the legal title shall prevail": *Eastman v. Foster*, 8 Met. 19, 29. The surety's right of subrogation to securities held by the creditor is subordinate, and not superior, to the rights of the latter. His right is, to be put in the same position as the creditor, not in a better one. He cannot have the benefit of the security without assuming the burden to which it is subject, — without dis-

charging the indebtedness for the payment of which it is held. His right rests, not upon contract, but upon principles of natural justice: *Hayes v. Ward*, 4 Johns. Ch. 123, 130; 8 Am. Dec. 554. It would be unjust to permit him, on payment of part of the debt or one of several debts, to appropriate to the satisfaction of such debt or part of a debt a security which the creditor holds for the satisfaction of the entire indebtedness. It would be putting him, not in the same position as the creditor, but in a better one. It would tend to "defeat the object and end of suretyship," and might, in some cases, place the creditor in a worse position than he would occupy without a surety: *Gannett v. Blodgett*, 39 N. H. 150, 154, 155. To hold that the plaintiff, on payment of his debt, only was entitled to be subrogated to the attachment is to hold that he could compel the bank to appropriate the attached property to the satisfaction of that debt, and deprive them of their right to apply it on the other debts. It is to hold that the vigilance of the bank in obtaining the attachment security is to operate, not to their advantage, but to that of the plaintiff. If Dearborn had made to the bank a general payment on their claims against him, without appropriating it to any particular debt, or had made it with express authority to the bank to apply it on such of his debts as they chose, the plaintiff could as equitably ask that they be compelled to apply it on the debt for which he was liable: *Stamford Bank v. Benedict*, 15 Conn. 437, 445. The bank had the legal and equitable right to appropriate the attached property to the satisfaction of any of the claims secured by the attachments. The plaintiff could have acquired the bank's interest in the property by paying what equity would require him to pay. An assignment to him of that interest would not be equitable until he paid the debts for the payment of which the bank had obtained security by their attachment: *Brown v. Ray*, 18 N. H. 102, 104; 45 Am. Dec. 361; *Gannett v. Blodgett*, 39 N. H. 150; *Kidder v. Page*, 48 N. H. 380, 382, 383; *Belcher v. Hartford Bank*, 15 Conn. 381; *Stamford Bank v. Benedict*, 15 Conn. 437, 444, 445; *Root v. Stow*, 13 Met. 5; *First Cong. Society v. Snow*, 1 Cush. 510, 518; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Farebrother v. Wodehouse*, 23 Beav. 18.

But assuming that the law were otherwise, — assuming that the plaintiff, on payment merely of his own debt at any time during the life of the attachment, might, had he chosen to do so, have availed himself of the attachment lien, and might

have levied the execution for his own benefit on the attached funds, — the result is the same. The plaintiff did not pay the debt in the lifetime of the attachment, nor until long after it expired by operation of law. He did not refrain from paying, and from asserting a right to the lien, by reason of anything done by the bank. It distinctly appears not only that he never acquired the right of subrogation to the attachment lien, but also that he never would have acquired it if the lien had continued in force as long as the law permitted. The question is, whether, upon these facts, the plaintiff was discharged from liability by the bank's failure to levy the execution founded upon the note indorsed by the plaintiff on the attached property, or by the application of the property on their other executions. If the bank were under no obligation to apply the funds on the indorsed note judgment, the plaintiff cannot complain because they were not so applied. On the other hand, if the bank were bound to apply them on that judgment, the plaintiff, by their neglect to do so, was discharged from liability, and is entitled to recover the money paid on the judgment against him as paid by mistake. In either case, it is not material to him that the funds were applied on other judgments in favor of the bank. His complaint is, not that the bank have got the funds rather than any one else, but that by their action, or by their non-action, he has been deprived of them. His injury, if any he has suffered, and the bank's liability are the same as they would have been if the funds had been lost by the bank's negligence, or if the judgments on which the bank applied them had been in favor of strangers instead of the bank. The bank's application was no wrong to the plaintiff, unless at the time of the application it was his right to have it made elsewhere. As against everybody except him, the bank had an unquestionable right to apply the funds on the indorsed note judgment, or on the other judgments, at their election. The actual application was merely conclusive proof of their election to abandon the lien on the former and to enforce it on the latter. The only ground on which the plaintiff can justly complain of the bank's action is, that it was his right to have the funds applied on the former judgment. The real question, then, is, Was the plaintiff discharged by the bank's neglect to apply the avails of the attached property on the indorsed note execution, or by their failure to levy it upon them?

The creditor may, without prejudice to his rights against

the surety, decline to accept additional security offered by the principal: *City Bank v. Young*, 43 N. H. 457, 461. He is under no obligation to pursue any of the remedies which the law gives him against the principal, though the surety requests him to do so: *Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539. He need not prove the debt against him in bankruptcy, exhibit the note to the deceased principal's executor, nor, if his estate is administered as insolvent, present it to the commissioner for allowance: *Sibley v. McAllaster*, 8 N. H. 389. In short, he is not required to take any active measures to obtain payment either directly from the principal, or out of property which he holds as security: *Concord Bank v. Rogers*, 16 N. H. 9, 17, 18. As between creditor and surety, it is the surety's business to see that the principal pays: *Sibley v. McAllaster*, 8 N. H. 390. The creditor's chief purpose in requiring a surety is to avoid the necessity of resorting to legal remedies against the principal, — to escape the vexation and expense of litigation, and cast that burden upon another. The surety's contract is, that he will himself pay the note when it falls due, and not that he will pay it in case the payee or holder cannot by due diligence enforce payment by the principal. If he performs his contract, the creditor has neither cause nor opportunity to institute legal proceedings.

A surety paying the debt is entitled to be subrogated to the securities and remedies held by the creditor at the time of payment. If the creditor, without the surety's consent, surrenders a demand placed in his hands by the principal as security for the payment of the debt, the surety is discharged to the extent of its value: *N. H. Sav. Bank v. Colcord*, 15 N. H. 119; 14 Am. Dec. 685; *Watriss v. Pierce*, 32 N. H. 560. It does not, however, follow that he is discharged by the creditor's abandonment of a lien which he has obtained on the principal's property by process of law. The lien acquired by attachment differs from ordinary securities, among other things, in that it cannot be preserved without active diligence and continuous expense. It is dissolved by a failure to enter the action, by its discontinuance after entry, by a judgment for the defendant, and expires by operation of law in thirty days after judgment for the plaintiff: Gen. Laws, c. 224, sec. 86. In order to maintain and avail himself of the lien, the plaintiff must pursue the suit to judgment in his favor, and make a levy within thirty days thereafter. Both the prosecution of an

action and the making of a levy are attended with trouble and expense. By a levy, if the property is in dispute, serious liabilities may be incurred. The creditor is under no obligation to subject himself to the expense or to the liability for the surety's benefit. The latter, by seasonable payment of the debt, may acquire the right to adopt and prosecute the action, and make the levy for his own benefit at his own expense. He is not obliged to exercise the right. He may adopt the action, or not, as he sees fit. If he does not, the creditor has no claim upon him for the expense of the suit. If he does, he must take, with the benefit of the action, the burden of its cost: *Low v. Connecticut etc. R. R. Co.*, 45 N. H. 370, 378, 379. It would be unjust to permit him to avail himself of the security without paying what it cost the creditor to procure and preserve it. He must also indemnify the creditor against further costs: *Concord Bank v. Rogers*, 16 N. H. 9, 17. It was (as for the purposes of the present question is assumed) the plaintiff's right, on payment of the debt for which he was liable within thirty days after the judgment was rendered, together with the accrued expense of the bank's action against Dearborn, and indemnifying them against further expense, to levy their execution for his own benefit on the attached property. If he thus became entitled to and claimed the right, the bank was bound to permit him to make the levy. This was the full extent of the plaintiff's right and of the bank's obligation. That the plaintiff did not assert the right was not the fault of the bank. He stands no better than he would if, being present at the time of the application made by the bank, he had protested against it, and had done nothing more. His non-acquisition of the attachment lien was due to his own neglect, and not to any fault of the bank. What might have been his remedy if he had acquired and claimed the right to levy, and the bank, by reason of a previous application of the funds on other judgments, or for any cause, had refused to permit him to make it, is a question not raised by the case.

A surety is not discharged by the creditor's discontinuance of an action brought by him against the principal, and the consequent dissolution of an attachment of the principal's property: *Concord Bank v. Rogers*, 16 N. H. 9; *Baker v. Davis*, 22 N. H. 27, 37; *Barney v. Clark*, 46 N. H. 514. In the last-named case the action was discontinued after the defendants were defaulted. If a reason might be suggested (though none

has been, and none is perceived) for giving to the abandonment of an attachment after a default or after judgment a legal effect different from an earlier abandonment, there is no ground for claiming any greater effect for one made after judgment than for one made after a default. A defendant's liability, and a plaintiff's right to the application of the attached property in satisfaction of the debt, are as conclusively fixed by a default as by a judgment. It cannot be held that the plaintiff was discharged from liability by the bank's failure to levy the execution and the consequent dissolution of the attachment by lapse of time, without overruling *Barney v. Clark*, 46 N. H. 514.

A surety has no right, in law or in equity, to require the creditor to satisfy his demand out of the principal's property, rather than his own. For the purpose of his remedy for a breach of the contract, the creditor is entitled to treat the surety as a principal. He may sue them jointly, or severally if the contract is several, attach the property of each, and levy his execution upon that of either, at his election. The position of the plaintiff cannot be sustained without depriving the creditor of this right. A creditor holds a note for one hundred dollars against A, with B as surety, and a note for the same sum against A alone. He sues the former note, attaches and sells on the writ the property of each to the value of one hundred dollars, and also sues the latter note, and attaches the same property of A subject to the former attachment. He obtains judgment at the same time in both suits. Apparently, both debts are fully secured. But the avails must be applied on one or the other of the judgments within thirty days, or the security is lost. If the avails of A's property are applied on the judgment against A and B, the latter is discharged because the debt is satisfied. If they are applied on the judgment against A alone, B is discharged, says the plaintiff, because thereby the attachment in the suit against A and B is released. It is not material at what time within the thirty days the creditor makes the application; its legal effect is the same whether made on the twenty-ninth, or at the last moment of the thirtieth day after the judgment. The surety's discharge is certain. He has no occasion to pay the debt and assert his right to levy the joint execution on A's property. It is better for him to stand aloof and do nothing. In effect, he is discharged by the attachment, or at all events by the attachment and judgment. If the creditor attaches the principal's property and pursues



the action to judgment, the surety is inevitably discharged. If he attaches land, he must take his pay in land at its appraised value, instead of the lawful money which the surety as well as the principal agreed to pay. If such is anywhere the law, it is not the law here.

The lien acquired by attachment is merely the right to levy the execution on the particular property attached: *Kittredge v. Warren*, 14 N. H. 509, 526. It is a valuable right, but it is of no greater value than the right to levy on property not attached. The creditor has no better right and is under no greater obligation to the surety to levy on the attached property than on any other equally exposed to levy. The surety may be no more injured by his failure to levy in the one case than in the other. If he is not discharged by the creditor's refusal to levy at his request on a failing principal's unencumbered property which other creditors are about to seize, and which is pointed out to him by the surety (*Davis v. Huggins*, 3 N. H. 231; *Mahurin v. Pearson*, 8 N. H. 539), no good ground is perceived for holding that he is discharged by a neglect to levy on property attached. In each case alike the surety may pay the debt, and levy the execution for his own benefit.

The doctrine contended for by the plaintiff is not necessary for the surety's protection. So far as it might tend to deter the creditor from bringing suit against and attaching the property of the principal, it would operate to his prejudice. He is chargeable with knowledge that the principal has not performed the contract, if such is the fact. The creditor is not bound to inform him that the debt is not paid: *Sibley v. McAllister*, 8 N. H. 389, 390; *New Hampshire Sav. Bank v. Downing*, 16 N. H. 188. The plaintiff might have had the full benefit of the attachment by performing his contract and paying the debt at any time while the lien subsisted. It is no sufficient answer for him to say that he did not know of the suit against Dearborn, or of the attachment. The bank were under no obligation to sue Dearborn, to attach his property, or upon doing so, to notify the plaintiff of the fact. Service of the writ upon the plaintiff was notice that the debt had not been paid. He was put upon inquiry touching all the facts relating to his liability. Ordinary care would have informed him of the suit against Dearborn, and of the attachment. His loss is caused, not by any act of the bank, but,— 1. By his own breach of the contract in not paying the note when it fell due;

and 2. By his subsequent negligence. The cited and conflicting decisions in other jurisdictions have not been overlooked. Demurrer sustained.

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**SURETYSHIP — SUBROGATION.** — The right of subrogation to the rights of the creditor is part of the contract of suretyship: *New England etc. Ins. Co. v. Randall*, 42 La. Ann. 260; *Penn v. Ingles*, 82 Va. 65; *Benne v. Schnecko*, 100 Mo. 251. But the surety's right to subrogation is subordinate to the rights of the creditor: *Thomas v. Stewart*, 117 Ind. 50; *Smith v. Harbin*, 124 Ind. 434.

**SURETYSHIP — EXHAUSTING REMEDY AGAINST PRINCIPAL.** — A surety cannot require a creditor to exhaust his remedies against the principal before resorting to the surety, except under special circumstances: *Abercrombie v. Knox*, 3 Ala. 728; 37 Am. Dec. 721, and note; *Penn v. Ingles*, 82 Va. 65. But when a creditor goes into equity to enforce his debt against a principal and surety, the burden must be laid upon the principal first: *Id.*; yet the rule must not be carried to the extent of delaying the creditor indefinitely: *Bell v. McConkey*, 82 Va. 176. In *Skinner v. Terhune*, 45 N. J. Eq. 565, where a defendant obtained a judgment against a principal and surety, and levied upon both real and personal property, the personalty belonging to the principal, and the realty to the surety, it was decided that complainant, who held a judgment against the surety upon which execution had issued and levy made upon the real estate subsequent to defendant's judgment, had an equity to compel defendant to proceed to satisfy his judgment out of the personal property of the principal. The mere neglect of the holder of a note to pursue the makers until the principal becomes insolvent does not exonerate the surety: *May v. Reed*, 125 Ind. 199; *First Nat. Bank v. Holmesley*, 99 N. C. 531.

**PAYMENTS, APPLICATION OF.** — Where no application is made by the debtor or creditor, the law will apply a payment to the most burdensome of several debts: *Frazier v. Lanahan*, 71 Md. 181; 17 Am. St. Rep. 516. A surety cannot insist upon the application of a payment upon a secured debt in preference to a debt that is not secured: *Hanson v. Manley*, 72 Iowa, 48. Compare *Burke v. Albert*, 4 J. J. Marsh. 97; 20 Am. Dec. 209.

# CASES

IN THE

## SUPREME COURT

OF

### NORTH CAROLINA.

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#### COMMERCIAL BANK OF DANVILLE v. BURGWIN.

[88 NORTH CAROLINA, 62.]

**NEGOTIABLE INSTRUMENTS — PRESUMPTION IN FAVOR OF HOLDER — BURDEN OF PROOF, WHEN SHIFTED.** — It is presumed *prima facie* that the holder of negotiable paper is the owner and took it for value before dishonor; but when fraud and illegality in its inception are pleaded in defense, and evidence to support the plea is introduced, the presumption is rebutted, and the burden of proof shifted to the holder to show that he is a *bona fide* purchaser for value without notice.

*R. H. Battle and S. F. Mordecai*, for the appellant.

*A. W. Graham*, for the respondent.

**SHEPHERD, J.** The note sued upon was negotiable, "and there is a *prima facie* presumption of law in favor of every holder of a negotiable paper to the extent that he is the owner of it, and that he took it for value and before dishonor": *Parsons on Notes and Bills*, 255; *Tredwell v. Blount*, 86 N. C. 33.

Where, however, fraud or illegality in the inception of the instrument is pleaded, and the defendant introduces evidence tending to establish such plea, then the *prima facie* case made by the indorsee, who simply offers the note and proves its execution, is so far rebutted as to shift the burden of proof and to render it essential to his right of recovery that he show that he is a *bona fide* purchaser for value and without notice: *Pugh v. Grant*, 86 N. C. 39; 1 *Daniel on Negotiable Instruments*, 815.

Mr. Daniel says (sec. 166) that in such a case "a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted

to suffer; but as the knowledge of the manner in which it came into his hands must rest in his bosom, and the means of showing it must be much easier to him than to the defendant, he is required to give proof that he became possessed of it for a sufficient consideration. If he is innocent, the burden must generally be a light one, and if guilty, it is but a proper shield to one who would be, but for its protection, his victim."

Applying these principles to the case before us, it is plain that his honor erred in charging the jury that if they believed the evidence the plaintiff was a purchaser for value and without notice.

The defendant pleaded that the execution of the note was induced by the fraudulent representation of the payee, and there was evidence tending to establish the alleged fraud. It then became incumbent on the plaintiff to show that he purchased for value and without notice, and failing to do this, he was not entitled to the instruction given by the court. It is but just to say that while this point is properly taken here, it does not seem to have been made in the court below, the question there being the effect of actual notice to the vice-president of the plaintiff, under the circumstances.

The case of *Applegarth v. Tillery*, 105 N. C. 407, cited by the plaintiff's counsel, does not conflict with the view we have taken. In that case there was ample testimony to show that the plaintiff purchased before maturity for value and without notice, and there was no contradictory evidence as to these points. The court held that mere proof that the payee had procured the note by fraud was no evidence to contradict the express testimony of the plaintiff that he was the owner. This is very plainly the ground of that decision, and we cannot regard the reference to the first prayer of instruction as controlling the real meaning of the opinion. Certainly the court did not intend to impinge upon the firmly established principles which we have laid down as applicable to the facts before us.

It is further to be observed that the sole issue in that case related only to the ownership of the note sued upon.

New trial granted.

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**NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — POSSESSION PRIMA FACIE EVIDENCE OF OWNERSHIP.** — Possession of a note is *prima facie* evidence of ownership; but where there is evidence of fraud in its inception, the burden of proof is upon the holder to show a *bona fide* transfer: *Henry*

v. *Sneed*, 99 Mo. 407; 17 Am. St. Rep. 580, and note; *Knapp v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220, and note. Where a plaintiff in an action on a negotiable note produces it at the trial, the law presumes that he is the owner thereof: *Applegarth v. Tillery*, 105 N. C. 407; *Farmers' etc. Bank v. Arthur*, 75 Iowa, 129; *Beal v. Stevens*, 79 Iowa, 28. The burden of proof is upon the holder to establish *bona fide* ownership, where evidence of fraud is introduced: *Goodrich v. McDonald*, 77 Mich. 486; *Barnes v. Peet*, 77 Mich. 391; *Mace v. Kennedy*, 68 Mich. 389. When a promissory note is in the usual form, with nothing indicating that it was taken in an illegal transaction, the presumption is, that the holder is the *bona fide* owner: *Chapman v. Remington*, 80 Mich. 552.

## STATE v. TAYLOR.

[106 NORTH CAROLINA, 196.]

**ELECTION, ESSENTIALS OF.** — It is essential to a valid election that it be held by lawful authority, substantially as prescribed by law.

**OFFICE AND OFFICER — OFFICER DE FACTO.** — To constitute a person an officer *de facto*, there must at least be some colorable election or appointment to and induction into office.

**OFFICE AND OFFICER — USURPER, WHEN BECOMES OFFICER AS TO THIRD PERSONS.** — Although the acts of a usurper who takes possession of an office are void, still, he may continue to act for so long a time and under such circumstances as to afford a presumption of his right to act. His acts are then valid as to the public and third persons, but he has no defense in a direct proceeding against himself.

**ELECTION CONDUCTED BY USURPER IN OFFICE IS VOID.** — Where a registrar of voters appoints a clerk who fraudulently gets possession of the registration-books, and refusing to surrender them upon demand of the registrar, appoints judges of election, opens polls, receives, canvasses, and makes returns of voters, he is a mere usurper, and such election is void.

**ACTION to try title to an office.** The relator, Van Amringe, claimed to have been duly elected clerk of the superior court at a regular election. This the defendant, who holds the office, denied, on the ground that the votes cast in Cape Fear precinct at said election were rightfully rejected because the registrar of voters in that precinct was a usurper in office, rendering the election void. Without the rejected votes, the defendant had a majority of the votes cast at such election. The facts in connection with the election in such precinct are stated in the opinion. Judgment for defendant, and the relator appealed.

*D. L. Russell*, for the appellant.

*George Rountree and M. Bellamy*, for the respondent.

**MERRIMON, C. J.** The ascertainment of the popular will or desire of the electors under the mere semblance of an election

unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion, and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government. Hence if a person assume to be a registrar of elections, and four others likewise assume to be judges of election, and purport and undertake to hold an election on election day, in an election precinct, and take and count the votes cast at it honestly, such action and proceeding would be no election, nor would it be accepted and treated as such by authority. An essential element of a valid election is, that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly; it must, as well, have legal sanction. The statutory provisions and regulations in respect to public elections in this state must be observed and prevail, certainly in their substance; otherwise the election will be void, and so treated. Therefore, the contention that if the election in question was simply conducted fairly and honestly it was valid is unfounded.

The court instructed the jury that Thomas was *registrar de facto* if they believed either of the two aspects of the evidence, and the election would hence be valid. As to this there was no exception. But the court said further: "If you find from the evidence that Cowan continued to act as registrar, and employed Thomas as clerk to assist him, and that Thomas, whilst sustaining this relation to Cowan, fraudulently obtained possession of the books on the second Saturday preceding the election, with a promise to return them, and assumed to act as registrar, he was an intruder, and had no authority, and could perform no lawful official act, and in consequence the election held by him and his appointees was void, and your answer to the issue should be, No." This is made the principal ground of assignment of error.

The instruction thus complained of must be taken in connection with the whole of the instructions given, and in view

of all the evidence pertinent. The evidence tended to prove that one Cowan was duly appointed to be registrar; that he accepted the office, and acted as and claimed to be such, continuously, until the day of the election; that he did not resign, or profess to resign; that he did not appoint or undertake to appoint Thomas to be registrar; that he was employed and treated simply as his clerk; that Thomas fraudulently got the registration-books from the registrar under the false promise to return the same; that he did not do so, but on the day of election expressly refused to surrender the registration-books, and then assumed to be registrar, acted as such, and undertook and purported to appoint three judges of election, who, with a judge regularly appointed, co-operated with him in holding the election. The evidence fully warranted the instruction, if it was correct in point of law.

It is difficult to define in precise terms what constitutes an officer *de facto* in all cases. Indeed, what may constitute such officer in one case may not in another. A variety of facts and circumstances tending to show authority of the person claiming and exercising it go to constitute such officer, and upon grounds of necessity and public policy to give his acts validity as to the public and persons taking benefit of his official acts. There must be something, — some consideration, evidence, facts, circumstances, or conditions that reasonably lead those persons who, in the course of the administration and the discharge of the duties of the office, must, in some way, have relations or business with it to recognise and treat the person claiming to be officer as the lawful incumbent. But, as was said by Chief Justice Ruffin in *Burke v. Elliott*, 4 Ired. 361, 42 Am. Dec. 142, "The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer *de facto*. There must, at least, be some colorable election and induction into office *ab origine*, or so long an exercise of the office and acquiescence therein of the public authorities as to afford to the individual citizen a presumption strong that the party was duly appointed, and therefore that every person might compel him, for the legal fees, to do his business, and for the same reason was bound to submit to his authority as the officer of the country."

What was thus said was afterwards approved in *Gilliam v. Reddick*, 4 Ired. 368; *Burton v. Patton*, 2 Jones, 124; 62 Am.

Dec. 194; *Commissioners v. McDaniel*, 7 Jones, 107; and in *People ex rel. v. Staton*, 73 N. C. 546, 21 Am. Rep. 479, in which case Mr. Justice Reade said: "I scarcely think it necessary to cite authorities to show the distinction between mere usurpers and officers *de facto* and *de jure*. A usurper is one who takes possession without authority. His acts are utterly void, unless he continues to act so long a time or under such circumstances as to afford presumption of his right to act; and then his acts are valid as to the public and third persons. But he has no defense in a direct proceeding against himself. A *de facto* officer is one who goes in under color of authority": *Keeler v. Newbern*, Phill. (N. C.) 505.

In a late case (*State v. Lewis*, 107 N. C. 967), Justice Avery cites with approval *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, in which Chief Justice Butler reviews very thoroughly and ably the whole subject of officers *de facto*, and reaches substantially this conclusion: "An officer *de facto* is one whose acts, though not those of an officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, when the duties of the office were exercised,—1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; 2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; 3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some irregularity or defect in its exercise, such ineligibility, want of power, or defect being unknown to the public; 4. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

This summary points out to a very large extent, if not altogether, the nature and extent of the circumstances, conditions, the character of the evidence, and the recognition by the public essential in varying pertinent cases to constitute an officer *de facto*. A mere intruder or usurper is not ordinarily, but may become, an officer *de facto* in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and



the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when, without color of authority, he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency: *Burke v. Elliott*, 4 Ired. 361; 42 Am. Dec. 142; *People ex rel. v. Staton*, 73 N. C. 546; 21 Am. Rep. 479; *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409; McCrary on Elections, 217; Paine on Elections, secs. 380, 381.

The citizen is justly chargeable with laches, does that which is in his own wrong and wrong to the public, when he recognizes, tolerates, encourages, and sustains a mere usurper, one whom he knows, or ought under the circumstances to know, to be such. In such case, neither justice, necessity, nor public policy requires that the acts of the usurper shall be upheld as valid for any purpose. Indeed, these things, the spirit and purpose of government, strongly suggest the contrary.

When, therefore, Thomas obtained from the registrar (Cowan) the registration-books fraudulently, under promise to return the same, and assumed to act as registrar, he was simply an intruder, and had no authority and could perform no lawful official act as such, and the election which he and the supposed judges, his appointees, co-operating with him, held was void. The instruction of the court to the jury excepted to was pertinent, and had reference to the evidence going to prove that Thomas so fraudulently obtained the registration-books and assumed to act as registrar, and the jury must have found that he did. The jury found that he was not registrar *de facto* by reason of color of appointment. They found, also, that he was a fraudulent intruder, but they did not find — nor was there evidence to warrant such finding — that he was an intruder under such circumstances and conditions as to constitute him registrar *de facto*. The evidence went to show that he had been the clerk of the registrar; that he did not claim to be or act as registrar until the day of election; that he had no such reputation; that the electors had not so recognized him; that no public authority had so recognized him at any time; and that, on the morning of the day of the election, in the presence of electors, the law-

ful registrar had publicly demanded that he surrender to him the registration-books, to the end that he and the lawfully appointed judges of election might hold the election according to law, and he refused to do so. The evidence went to prove, and the jury found, that Thomas was a naked intruder, with no attending circumstances and conditions that rendered him registrar *de facto*. The electors had notice that Cowan was the lawful registrar; that he had been duly appointed; that he acted as such. There was no notice that he had resigned his office, nor had he done so. On the contrary, on the morning of the election he claimed his right and authority to hold the election. This was notice — important notice — that Thomas was an intruder, and the election was not such in contemplation of law. The electors ought not to have recognized the intruder. They did so in their own wrong. They ought to have demanded and required that the registrar and the lawful judges of election hold the election according to law. It was their duty to themselves and to the public to have done so, and failing in this for any cause, they ought not to have gone through an empty form that had no legal effect. They lost their votes and their voice in part through their own laches.

The issue of fact submitted to the jury was broad and comprehensive. It embraced the whole of the matter at issue. The relator could readily, as he did, put in all pertinent evidence, and avail himself of it before the jury. He was not necessarily prejudiced by it, nor can we see, nor does it at all appear, that he was. The other exceptions are without merit.

Judgment affirmed.

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**ELECTIONS.— VALIDITY.** — As to what are the essentials to the validity of an election, see note to *People v. Bates*, 83 Am. Dec. 749-754.

**OFFICERS DE FACTO, WHO ARE:** See *Hamlin v. Kaeser*, 16 Or. 458; 3 Am. St. Rep. 176, and note. Where an officer *de jure* fills an office and performs its duties, another person cannot become an officer *de facto* of the same office, even though he may claim it under color of title: *State v. Blossom*, 19 Nev. 312. Compare *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557.

**OFFICER DE FACTO, VALIDITY OF ACTS OF.** — The acts of an officer *de facto* are valid when they concern the public or third persons: *Jewell v. Gilbert*, 64 N. H. 13; 10 Am. St. Rep. 357, and note; *In re Burke*, 76 Wis. 357; *Fancher v. Stearns*, 61 Vt. 616. The rule is applied to the officers *de facto* of elections in *Hunnicut v. State*, 75 Tex. 234.

**HARRISON v. RAY.**

[108 NORTH CAROLINA, 215.]

**HUSBAND AND WIFE—EFFECT OF DEEDS ON DEAD TO.**—Where land is devised or conveyed to husband and wife, they take by entirety, and upon the death of one, the whole vests in the other by right of survivorship.

**PARTITION BETWEEN TENANTS IN COMMON BY CONSENT—EFFECT OF.**—Where partition between tenants in common is made by consent by means of deeds mutually executed, the deeds do not pass title to any real estate, but simply designate the share of each by metes and bounds, destroying the unity of possession, and allotting the land to be held in severalty; nor do the deeds operate as an estoppel, except to establish the extent of the interest of each tenant in his ancestor's lands.

**ACTION** to recover the title and possession of land. Oakley Harrison and his brothers and sisters divided the lands inherited by them from their father by deeds of partition without legal proceedings. The deed for said Harrison's share, the land in dispute, was made to him and his wife, Juda, who after his death married the defendant Ray. The plaintiffs are Harrison's children by his first wife, and allege that the name of said Juda was inserted in the deed by mistake. This issue being found, and judgment entered against them, they appealed.

*J. H. Fleming*, for the appellants.

*Fuller and Snow*, for the respondents.

**CLARK, J.** When realty is devised or conveyed to husband and wife, they take by entirety, and upon the death of one, the whole belongs to the other by right of survivorship: 2 Bla. Com. 182; *Long v. Barnes*, 87 N. C. 329; *Simonton v. Cornelius*, 98 N. C. 433. The act abolishing survivorship in joint tenancies (Acts of 1784, c. 204; Code, sec. 1326) does not apply to such cases: *Motley v. Whitmore*, 2 Dev. & B. 537; *Todd v. Zachary*, Bush. Eq. 286; *Woodford v. Higly*, 1 Winst. 237. Indeed, it is held that a conveyance to husband and wife has a fifth unity added to the four common-law unities recognized in joint tenancy; i. e., unity of person: *Topping v. Saddler*, 5 Jones, 357; *Freeman on Cotenancy and Partition*, sec. 64.

But in the present case the deed to Oakley Harrison and wife operated merely as a partition of the lands, and conveyed no estate to them. The land in controversy was the share of Oakley Harrison in the lands inherited by him and his brothers and sisters. This tract was ascertained to be his share by the consent partition, which was had in lieu of legal proceed-

ings to appoint commissioners to mark it off and assign it. It is not claimed that Juda, the wife, had any interest in the land so that anything should have been assigned her, but it is contended that by Oakley Harrison's direction the deed was drawn to him and his wife jointly. Suppose this to be so. The grantors were not conveying any additional estate or interest to Oakley Harrison. He had bought nothing, and they were not making him a present of anything. The deed only assigned to him in severalty and by metes and bounds what was already his. The grantors conveyed no part of their shares. They had no interest in the share embraced in the deed to Oakley Harrison, and could convey no interest therein to him or any one else. It was his by the conveyance from his father. He received no title nor estate by virtue of the deed from his brothers and sisters, nor could his wife. His direction to the other heirs (if given) to convey to himself and wife could not have the effect to make the deed a conveyance of anything to his wife when it was not such as to himself. The title being already in him, the deed merely designated his share by metes and bounds, and allotted it to be held in severalty. No title passed by the deed, nor by any of the deeds. "Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take the allotment by purchase, but is as much seised of it by descent from the common ancestor as of the undivided share before partition": Allnatt on Partition, 124. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty; but such deed confers no new title or additional estate in the land: 2 Bla. Com. 186. Hence it is that in partition, whatever the form of the deed, there is an implied warranty of title by each tenant to all the others: *Huntley v. Cline*, 93 N. C. 458.

Had the deed from the brothers and sisters conveyed any new and distinct estate in the land allotted to Oakley Harrison, he certainly already had an interest therein. This was not conveyed to his wife, and such share would have been held by him and wife neither by a unity of interest, unity of title, nor unity of time; which three unities are as essential to a joint tenancy as the fourth unity (of possession), which alone they would have had.

There is no estoppel on the plaintiffs by virtue of Oakley Harrison having received and caused the deed to be registered; for, as we have seen, his title was not derived by the deed of

partition, but by the deed from his father. The deed of partition is only an estoppel as between the plaintiffs and the brothers and sisters of Oakley Harrison, as establishing the extent of his share of his father's lands thus set apart and allotted in severalty.

In this view of the matter we are supported by the very recent case of *Yancey v. Radford*, 86 Va. 638 (March, 1890), which is well considered and exactly in point. To same effect is *Dooley v. Baynes*, 86 Va. 644.

The issue submitted was immaterial. Upon the admission in the answer, judgment should have been entered in favor of the plaintiffs *non obstante veredicto*: *Moye v. Patway*, 76 N. C. 327; *Ward v. Phillips*, 89 N. C. 215; *Walker v. Scott*, 106 N. C. 56.

Reversed.

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**HUSBAND AND WIFE, DEED OR DEVISE TO, EFFECT OF.** — Where land is conveyed to a husband and wife, both are seized of an entirety, and the survivor takes the whole estate: *Smith v. Smith*, 23 Wis. 176; 99 Am. Dec. 153, and note; *Hemingway v. Scales*, 42 Miss. 1; 97 Am. Dec. 425, and note; *Simonton v. Cornelius*, 98 N. C. 433; *Edmondson v. City of Moberly*, 98 Mo. 523. Upon a grant or devise to a husband or wife, they take as tenants in common, unless expressly declared joint tenants: *Wilson v. Wilson*, 43 Minn. 398. A deed executed to a husband and wife creates an estate in joint tenancy: *Dowling v. Sallotta*, 83 Mich. 131.

**CO-TENANTS — PARTITION BETWEEN, BY CONSENT.** — If tenants in common, intending to make partition, run and mark upon the ground a division line, and take possession of their respective parts in pursuance thereof, partition is fully executed between them: *McKnight v. Bell*, 135 Pa. St. 358; *Borden v. Curtis*, 46 N. J. Eq. 468.

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## BEAM v. BRIDGERS.

[108 NORTH CAROLINA, 276.]

**HUSBAND AND WIFE — PURCHASE BY HUSBAND. — RESULTING TRUST IN FAVOR OF WIFE** is created where a husband agrees to treat the wife's money as her separate estate, and invests it in land for her benefit, taking the title in his own name.

**PARTITION.** The testimony proved that Mrs. Beam being possessed of certain money, her husband voluntarily agreed to treat it as her separate estate and to invest it in the land in dispute. This he did, purchasing from A. Bridgers and taking the title in his own name.

*M. H. Justice*, for the appellants.

*J. A. Forney*, for the respondents.

SHEPHERD, J. The only question presented for review is, whether there was sufficient evidence to sustain an affirmative finding of the second issue. We think it very clear from the testimony of James and William Bridgers that John Beam purchased the land in question with his wife's money at her request; that the purchase was intended for her benefit, and that such was the understanding and agreement of the parties. It may also be inferred that she intended that the title should be made to her. Indeed, the agreement was that the husband should purchase the land "for her," and the necessary implication is, that the title was to be taken in her name. It is a well-settled principle that where, on the purchase of property, the conveyance of the legal estate is taken in the name of one person, but the purchase-money is paid by another at the same time or previously, and as a part of one transaction, a trust results in favor of him who supplies the purchase-money: *Adams's Eq. 33*; *Malone on Real Property, 509*. The principle has frequently been applied where land is purchased with funds arising from the separate estate of the wife: *Cunningham v. Bell, 33 N. C. 328*; *Lyon v. Akin, 78 N. C. 258*; or with funds which, by agreement of the husband, are to be treated as such separate estate: *Hackett v. Shuford, 36 N. C. 144*, and cases cited.

It is urged, however, that in our case the money with which the land was purchased was not the separate estate of the wife, and that the agreement of the husband to treat it as such being purely voluntary, and therefore of no effect, there was nothing to prevent the operation of the principle by which the money of the wife became the property of the husband *jure mariti*.

The argument derives some support from the intimation of the learned justice who delivered the opinion in *Hackett's* case, *supra*, but it will appear from an examination of the Maryland cases (alone cited by him) that the rights of creditors were involved, and that so far from any pecuniary consideration being necessary as between the parties, the contrary view was declared by the supreme court of that state. The case upon appeal does not very clearly show how the wife acquired or held the money in question, but granting that it was subject to the marital rights of the husband, we think that, as between him and his wife, his agreement to treat it as her separate property would be recognized in equity in cases like this, especially where there were no children to be provided for, and

the claim of the wife was more meritorious than that of the collateral heirs, whom the husband was under no moral obligation to maintain: *Garner v. Garner*, Busb. Eq. 1; 57 Am. Dec. 583.

It is said by high authority that although the presumption is, that the money of the wife during the marriage becomes the husband's, such presumption is not conclusive, and the husband "may so treat it as to charge himself and his heirs, as trustees of the wife, with the duty of applying it to her separate use": *Taggard v. Talcott*, 2 Edw. Ch. 628; *Resor v. Resor*, 9 Ind. 349; *Temple v. Williams*, 4 Ired. Eq. 39; *Woodruff v. Bowles*, 104 N. C. 197.

It is well settled that a husband may, after marriage, make gifts and presents to his wife which will be supported in equity against himself and his representatives: *Lucas v. Lucas*, 1 Atk. 270; Atherly on Marriage Settlements, 331; *Garner v. Garner*, Busb. Eq. 1; 57 Am. Dec. 583; *Smith v. Smith*, Winst. Eq. 30; and it seems to be also well established that a trust may be raised in favor of the wife by proof that her husband paid the purchase-money for her benefit and with his own funds: *Raybold v. Raybold*, 20 Pa. St. 308; *Pinney v. Fellows*, 15 Vt. 525; *Farley v. Blood*, 80 N. H. 354; *Dyer v. Dyer*, White and Tudor's Lead. Cas. Eq. 341.

In consideration of the foregoing authorities, we see no reason why the agreement of the husband in this case may not be sustained as against the parties to this action; and this being so, it must follow that there was a resulting trust.

Affirmed.

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**HUSBAND AND WIFE—PURCHASE BY HUSBAND—RESULTING TRUST IN FAVOR OF WIFE.**—Where property is purchased by a husband with the separate funds of the wife and the deed taken in his name, the legal title is in him, and a trust results in the wife's favor: *Lowentroust v. Campbell*, 130 Ill. 503; *Wrightsville R'y Co. v. Holmes*, 85 Ga. 668; *Buchanan v. Hubbard*, 119 Ind. 187; *Montgomery v. Noyes*, 73 Tex. 203. Where land is purchased with the money of a husband in the name of the wife, there is a resulting trust in his favor: *Belford v. Crane*, 16 N. J. Eq. 235; 84 Am. Dec. 155, and note; *Gilliland v. Gilliland*, 96 Me. 522.

## GRUBBS v. NORTH CAROLINA HOME INSURANCE CO.

[108 NORTH CAROLINA, 472.]

**INSURANCE — WAIVER BY AGENT.** — An insurance agent authorized to take risks and issue policies has authority to waive by parol a condition in a policy issued by him.

**INSURANCE — POWER OF SUBAGENT.** — Where a general insurance agent permits his subagent to receive premiums from and to fill up and deliver policies to the insured, the acts of the subagent are regarded as the acts of the general agent, and persons dealing with such subagent have a right to judge of the extent of his authority by the nature of the business intrusted to him.

**INSURANCE — WAIVER OF CONDITION AGAINST ADDITIONAL INSURANCE BY AGENT.** — Where the insured, holding a policy conditioned that it would be void if any additional insurance were taken without the written consent of the company indorsed thereon, notifies the company's subagent who issued the policy of his intention to take out additional insurance, and such agent says that it will be all right, this will constitute a waiver of such condition by the company.

**INSURANCE — WAIVER OF FORFEITURE.** — Where, after breach of condition in an insurance policy, the insurer, with knowledge of the facts constituting the breach, by his conduct leads the insured to believe that he still recognizes the validity of the policy, and considers him protected by it, and induces him, under such impression, to incur expense, he will be deemed to have waived the forfeiture, and estopped from setting it up as a defense.

**INSURANCE — WAIVER OF FORFEITURE.** — Where, with knowledge of facts constituting an alleged waiver, the insurer, through his adjuster, requires the insured to furnish an invoice of goods destroyed, proofs of loss, or plans and specifications of the building burned, or to appear for examination, such acts of the adjuster will constitute a waiver of forfeiture for failure to secure written indorsements of additional insurance as provided in the policy.

**INSURANCE — WAIVER OF FORFEITURE BY ADJUSTER.** — Where, after a fire, the adjuster of the insurance company joins the agents of other companies in an effort to adjust the loss, requires the production of the books of the insured for examination, asks for invoices from the time he went into business, or for duplicates because of their destruction, and objects to paying the loss only on the ground that he cannot agree with the insured as to the amount, and offers to pay his proportion of the loss as estimated by him, the company is estopped from insisting upon a forfeiture by reason of a breach of any conditions in the policy in reference to taking additional insurance.

**PRACTICE — INSTRUCTIONS.** — A refusal to consider written requests for instructions, unless presented at or before the close of the testimony, is not error.

**INSURANCE — MEASURE OF RECOVERY.** — The measure of recovery for loss of goods insured against fire is the market or cash value of the goods at the time and place of the fire.

**PRACTICE — SUBJECT FOR COMMENT BY COUNSEL.** — The fact that defendant's witness, who was present at a conversation between plaintiff and defendant's agent concerning the subject-matter in suit, was present in court, and not called to contradict plaintiff, is a legitimate subject for comment by counsel, who may argue therefrom that plaintiff should be believed.



*J. W. Hinsdale, T. W. Mason, and B. S. Gay*, for the appellant.

*R. O. Burton, Jr., R. B. Peebles, and W. C. Bowen*, for the respondents.

**AVERY, J.** The defendant asked the court to instruct the jury that, upon consideration of all the evidence, there was no waiver of the condition of the policy requiring the written consent of the defendant to be indorsed upon it provided the plaintiff should take out additional insurance in other companies. This request was equivalent to a demurrer to the whole of the evidence, it being admitted that additional insurance was taken out in other companies after the policy sued on was issued, without first securing the written indorsement of the defendant's consent upon it in accordance with the express requirement of one of its conditions.

If Dr. Ramsey, the agent with whom the plaintiff treated, was authorized to take fire risks and issue policies, he was empowered to waive by parol a condition in a policy issued by him: *Winans v. Allemania F. Ins. Co.*, 38 Wis. 342; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479; *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Kitchen v. Hartford F. Ins. Co.*, 57 Mich. 135; 58 Am. Rep. 344; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Viele v. Germania Ins. Co.*, 26 Iowa, 63; 96 Am. Dec. 83; Wood on Fire Insurance, sec. 391; *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422.

Where a general agent permits a subagent acting under his direction to receive premiums from and to fill up and deliver policies to the insured, the acts of the subagent are regarded as the acts of the general agent: *Continental Ins. Co. v. Ruckman*, 127 Ill. 365; 11 Am. St. Rep. 121. The powers of an agent are *prima facie* co-extensive with the apparent authority given him, and persons dealing with him may judge of their extent from the nature of the business intrusted to his care: Wood on Fire Insurance, sec. 500; *Hornthal v. Western Ins. Co.*, 88 N. C. 71; *Beal v. Park F. Ins. Co.*, 16 Wis. 241; 82 Am. Dec. 719; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276.

Though the authorities are conflicting upon many questions that have arisen as to the powers of insurance agents generally to bind the companies for which they act, there is a growing tendency to abrogate rules laid down by some of

the courts when the insured sought the principal officers of these corporations in the larger towns, and asked the agents to forward applications for insurance, instead of waiting at their homes for agents sent to solicit their patronage and stimulated to active and persistent effort by their employers. We concur with the judge below in the opinion that if Dr. Ramsey was intrusted by the defendant (as he testified that he was) with the blank applications, and with its policies duly signed by its officers, and was authorized to take risks without consulting the company, to issue policies by simply signing his name as agent, to collect premiums and cancel policies, then he was empowered, as agent, to waive the condition that no additional insurance should be taken. In the case of *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, an agent, when asked about the taking of additional insurance, said, in substance, that it would make no difference, but, without saying it in so many words, left the inference that consent in writing was not necessary; and the court held that the agent had waived a condition in the policy similar to that in plaintiff's policy, and that the insurers could not avoid liability under the contract because additional insurance was subsequently taken in another company without asking for or securing the indorsement of its written consent on the original policy. See also *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535. After testifying that he was permitted by the defendant to exercise all of the powers enumerated by the court in the foregoing instructions, Dr. Ramsey stated also that Grubbs did say to him that he would want further insurance, and that he (Ramsey) replied that he thought Grubbs could get it if he wished; that he did not remember any more of the conversation on that subject. The witness Gay testified that Ramsey said to Grubbs, when asked about further insurance, that it was all right, so that he did not insure for more than three fourths the value of the stock. Grubbs testified that he told Ramsey the exact amount of insurance that he proposed to place, and did take, in each of the other companies, which did not in the aggregate exceed three fourths of the value of the property insured. So that the facts in our case would more naturally warrant the inference that the agent did not require his assent to be indorsed in writing on the policy than the evidence in the Michigan authority cited above, because Ramsey not only conveyed the idea that it would be all right to get additional insurance, but added the

condition that the whole insurance should not in the aggregate exceed three fourths of the value of the property insured, thereby excluding the inference that he would insist upon any other condition. But even upon his own testimony, Ramsey was empowered to waive the indorsement, and if, after Grubbs notified him of the amount which he proposed to take, and did afterwards take, in each of the other companies, Ramsey, by his language, left Grubbs to infer that no objection would be made unless the aggregate amount of insurance in all of the companies should exceed three fourths of the value of the insured property, and Grubbs did not exceed that limit, then, if Grubbs was induced to believe that the forfeiture would not be insisted on unless the limit in the amount of insurance should be transcended, and acted under that impression in effecting additional insurance, that condition of the policy would be considered as waived by the company. We think, therefore, that there was no error in the rulings of the judge below upon which the sixth, fourteenth, fifteenth, sixteenth, and seventeenth exceptions are founded. It seems that some of the counsel abandoned, while other counsel insisted upon, the exceptions numbered from 1 to 8, inclusive, and so much of exception 10 as referred to the refusal of the court to give special instructions asked by defendant, and numbered 7. If, after a breach of the conditions of a policy, the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they still recognize the validity of the policy, and consider him as protected by it, and induce him under such impression to incur expense, they will be deemed to have waived the forfeiture, and will be estopped from setting it up as a defense: *Viele v. Germania Ins. Co.*, 26 Iowa, 9, and note 68; 96 Am. Dec. 88; *Oshkosh G. L. Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233.

Where, with a knowledge of the facts constituting the alleged waiver, the insurer, after the insured property had been destroyed by fire, requires the insured to furnish invoice of goods destroyed, proofs of loss, or plans and specifications of the building burned, or to appear for examination, such acts of its adjuster amount to a concession that the forfeiture for failure to secure the indorsement of additional risks will not be insisted upon: *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Webster v. Phoenix Ins. Co.*, 26

Wis. 67; 17 Am. Rep. 479. Where, after a fire, the adjuster of a company joins the agents of other companies in the effort to adjust the loss, requires the production of books for examination, and asks for invoices from the time the insured went into business, and the invoices not being furnished because of their destruction by fire, then asks for duplicates, which the insured endeavored, by correspondence with creditors, to get, and objects to settling on the ground only that he cannot agree with the insured as to the amount of loss, and offers to pay for his company its proportion of the loss as estimated by him, the company represented by such adjuster is estopped from insisting upon a forfeiture by reason of the breach of any conditions in the policy in reference to taking additional insurance: *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Argall v. Old North State Ins. Co.*, 84 N. C. 355. See especially opinion of Cooley, J., in *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51.

The testimony admitted after objection, and constituting the ground of exceptions 4, 5, and 7, will therefore appear at a glance to be competent, if our view of the law in reference to waiver by conduct subsequent to the loss, and inconsistent with the idea of insisting upon a forfeiture for failure to comply with the conditions set forth in the policy, be correct. It would follow, also, from the principle laid down by us that there was no error in so much of his honor's charge as relates to the doctrine of waiver by the acts of the defendant's agents after the property was destroyed, and this applies to the thirteenth, eighteenth, and nineteenth exceptions.

The defendant excepted to the refusal of the court to submit an issue involving the question whether the fact that plaintiff had obtained additional insurance in the other four companies was made known to the defendant before the fire occurred. It does not appear that the refusal of the court to allow the jury to answer such an issue specifically deprived the defendant of the opportunity to have presented to the jury any view of the law arising out of the testimony that was material to his defense, and there was, therefore, no error in the ruling complained of: *McAdeo v. Richmond etc. R. R. Co.*, 105 N. C. 151; *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727; *Lineberger v. Tidwell*, 104 N. C. 510; *Bonds v. Smith*, 106 N. C. 564. Indeed, it is apparent that, according to our view of the law governing this case, it is not material whether Primrose and Cowper, the president and

adjuster of the defendant company, or the agent, Ramsey, had notice of the additional insurance before the loss, since it is not denied that they had actual notice after the fire, and when Cowper, according to the testimony, so acted as to waive the right of the company to insist upon a forfeiture of the policy. Besides, it seems that, in order to make the issue tendered subserve the proposed purpose, it would be necessary now to amend it by interpolating the words "prior to the loss," and it is rather late to amend defective exceptions in this court.

The ninth exception is stated in the record as follows: "During the morning session of the court, and pending the argument of counsel, the court gave notice to counsel that no special instructions would be considered which were not presented at the convening of court for the afternoon session. Near the conclusion of the speech of Mr. Mason, who closed for the defendant, just at night, the defendant presented an additional special instruction, which was not considered, for the reason that it was not presented in apt time. Upon the conclusion of the speech of Mr. Mason, the court took a recess until after supper, when Mr. Burton closed for the plaintiff."

It was not error to refuse to consider written requests for instructions, unless presented to the court at or before the close of the testimony: *Marsh v. Richardson*, 106 N. C. 548; *Taylor v. Plummer*, 105 N. C. 56; *Powell v. Wilmington etc. R. R. Co.*, 68 N. C. 395.

The eleventh exception is stated in the record as follows: "There was evidence tending to support the eleventh and twelfth instructions asked by the defendant. The plaintiff's evidence tended to show that the cost of the goods, with five per cent added for cost of transportation, amounted to \$8,218.31, made up of the amount of inventory taken of August 8, 1889, \$5,852.71; and subsequent purchases show by his ledger account, and certain stocks of goods purchased from assignees, etc. (about \$475 worth), \$4,007.68, deducting the amount of sales from August 8th to the time of fire, \$1,478.01 in cash sales, and \$1,582.10 in credit sales, upon which there was an average profit of thirty per cent; that his purchases were upon thirty days and four months, and that a discount of from one to two per cent could have been obtained by purchasing in cash; that the value was at least \$7,400. The defendant's evidence tended to show that the value of the stock of goods did not exceed three thousand five hundred or

four thousand dollars at the time of the fire. His honor charged the jury, on the second issue, that the measure of damages was the fair cash value of goods at the time and place of the fire, and recapitulated the evidence *in extenso* as to the respective contentions of the parties on the question of damages. The defendant excepted."

The rule laid down in this court is substantially the same as that stated for the court by Justice Reade in *Fowler v. Old North State Ins. Co.*, 74 N. C. 89, and is expressed in almost identical language. In that case, as in ours, a stock of goods had been destroyed by fire, and the court held that "the measure of damages against the defendant is the market value of the goods (within the amount insured) at the time and place of the fire." His honor substituted "fair cash value" for "market value." We can see no material difference between the words used in the opinion referred to and the language of the charge. This court in that case cited May on Insurance, section 424, and the authority fully sustains the rule announced. Wood, in his work on insurance, section 445, says that one who takes out a policy on a stock of goods can recover "only such sum as the goods were actually worth at the time of the loss, not what they cost him, not necessarily what it would cost him to replace the goods, but the sum which the goods were worth when they were destroyed by the casualty insured against." The cost of the property in the market may be shown as one of the elements, but not the test, of its value when destroyed; and on the other hand, it is competent for the insurer to prove that there was a deterioration in the value of the goods after the purchase and before the loss, which, if not resulting merely from temporary depression in the market, will tend to establish the value at the time of the fire. The damage depends upon the ascertainment of the amount for which the property can be sold, and that, in turn, depends upon its actual value at the time and place of the fire: Wood on Insurance, p. 765, sec. 445; *Western Ins. Co. v. Norwich etc. Transp. Co.*, 12 Wall. 201. In *Wynne v. Liverpool etc. Ins. Co.*, 71 N. C. 125, the court construed the statement that the jury had found "the value of the stock on hand to be two thousand six hundred dollars" to mean just the same as if they had found that "the damage on account of the destruction of the goods" was two thousand six hundred dollars, thus indirectly giving sanction to the rule laid down by the judge below in this case.

In *Bebbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70, 8 Am. Rep. 494, the court said: "The value of the tobacco was what it was worth then and there,— what it would have sold for then and there"; and it would seem that there is no material difference between this rule and the charge of the judge that the "measure of damage was the fair cash value at the time and place of the fire." It is not material that the court declared that the value of a staple, like tobacco, at any particular point might be determined as well in another way by ascertaining the price in the usual markets, and deducting stamp duty, the cost of transportation, and other usual and necessary expenses. But it was not in fact necessary to have passed upon the question of the *quantum* of damages in that case at all.

The fact that Mr. Johnson, who was a witness for the defendant, and who was present in the bar, and aiding the defendant's counsel in the conduct of the case, was not examined to contradict the plaintiff Grubbs as to what occurred when he and Cowper came to adjust the loss, was a legitimate subject of comment; and it was not error to refuse to stop counsel from using the fact as an argument to show that the testimony of Grubbs should be believed.

We understand that the twelfth exception was abandoned. It was at any rate a waste of time to discuss it.

Upon a review of all the assignments of error, we think that there is not sufficient ground for a new trial, and that the judgment below should be affirmed.

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MERRIMON, C. J., dissented, and expressed it as his opinion that, aside from all question as to the power of the agent Ramsey to waive the condition in the policy against additional insurance, the evidence accepted as true did not constitute such waiver. In this connection he said: "The plaintiffs knew of the condition that if they took other further insurance without consent on the part of the defendant written on the policy sued upon, the latter would be void. They did not ask Ramsey, the agent, to waive the condition, to say that further insurance might be taken without consent written on the policy, nor did they give him or the defendant notice that they had taken further insurance, nor did the defendant or its agent have such notice until after the loss; at most, they only suggested their desire and purpose to obtain more. Nor did Ramsey tell them that they might take other insurance without having consent of the defendant indorsed on the policy sued upon, and that they might do so without notice to him or the defendant. The fair and just interpretation of what and all that was said by the plaintiffs and Ramsey is, that the former suggested their wish and purpose to obtain further insurance, and the latter said, in reply, they might do so, not exceeding two thirds of the value of the property insured, in the way and as

contemplated by the policy of the defendant held by the plaintiffs. Ramsey did not say they might do otherwise." This did not furnish any motive or reason on the part of the agent to waive the condition, nor did it furnish any reasonable ground for plaintiffs to believe that he had consented or intended such waiver, especially in the face of the fact that they negligently failed to have defendant's consent indorsed on the policy, and felt apprehensive that the insurer would not consent; citing, in support of this view, *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279; 28 Am. Rep. 322; *Sugg v. Hartford Fire Ins. Co.*, 98 N. C. 143; *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Healy v. Imperial Fire Ins. Co.*, 5 Nev. 268; May on Insurance, sec. 369-372; Wood on Insurance, sec. 496.

In regard to the second question, that the defendant, after the loss, by and through its adjuster, waived the condition in question, and is estopped to claim the benefit thereof by taking steps to ascertain the extent of loss, with a view to pay its proportion of liability upon the policy, Judge Merrimon said: "But the defendant's agents did not say their purpose was to waive the condition; nor was there any fair implication that they did, nor was there any consideration for such waiver. The mere fact that such inquiry was made could not reasonably or justly be treated as such waiver or an estoppel. The defendant might, without waiving any right or defense, make such inquiry, in order to learn what it ought, without regard to its legal liability, fairly to pay, if anything. It might, by such inquiry, ascertain whether the loss was fairly sustained, whether the insurance was too great, whether the stock of goods was as great as represented, or whether the same was overvalued, etc. Simply, such inquiry ought not to conclude the defendant as to any proper defense it might have. So far as appears, there are no considerations, valuable or otherwise, that in their nature do or ought to so conclude the defendant. It does not appear that the defendant was not in some way prejudiced by the additional insurance: May on Insurance, 2d ed., sec. 507."

**FIRE INSURANCE — WAIVER OF CONDITIONS.** — Conditions in a contract of insurance for the benefit of the company may be waived: *Kenyon v. K. T. etc. Ass'n*, 122 N. Y. 247. As to what is conduct on the part of the company necessary to constitute a waiver, see *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809; *Kenyon v. K. T. etc. Ass'n*, 122 N. Y. 247.

**FIRE INSURANCE — WAIVER OF CONDITIONS, HOW MAY BE MADE.** — A waiver of condition may be made orally by the company's agent: *McFarland v. Kuttaning Ins. Co.*, 134 Pa. St. 590; 19 Am. St. Rep. 723, and note; *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326, and note; *Insurance Co. v. Brodie*, 52 Ark. 11; *Stanhiser v. Mutual Mill Ins. Co.*, 76 Wis. 285; or may be raised by the acts or conduct of the company's agent: *Wachter v. Phenix Ins. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600; *Burson v. Fire Ass'n*, 136 Pa. St. 267; 20 Am. St. Rep. 919, and note. As to waivers of forfeitures incurred by taking additional insurance, see *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275, and note.

**FIRE INSURANCE — WAIVER OF FORFEITURE BY COMPANY — KNOWLEDGE OF THE FACTS.** — After loss, the company, with full knowledge of the facts which might work a forfeiture, may, by its declarations or conduct, waive the right to insist upon a forfeiture: *City Planing Co. v. Merchants' etc. F. Ins. Co.*, 72 Mich. 654; 16 Am. St. Rep. 552. Compare *Germania F. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203.

**FIRE INSURANCE — CLERKS OF AGENTS — WAIVER.** — An ordinary insurance agent has the power to employ clerks to discharge the ordinary busi-



ness of his agency, and a waiver by such clerk is the waiver of the agent himself: *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57; 21 Am. St. Rep. 721, and note. Insurance companies are responsible for the acts of clerks or sub-agents employed by their agents: *Indiana Ins. Co. v. Hartwell*, 123 Ind. 172.

**FIRE INSURANCE — MEASURE OF DAMAGES.** — The rule for the measure of damages on an insurance policy is the extent of the loss, or the actual damages: *Insurance Co. v. Starr*, 71 Tex. 733; *State Ins. Co. v. Taylor*, 14 Cal. 499; 20 Am. St. Rep. 281, and note.

**TRIAL — COMMENTS OF COUNSEL UPON THE FAILURE OF A PARTY TO TESTIFY OR PRODUCE EVIDENCE:** See *Hunt v. State*, 28 Tex. App. 149; 19 Am. St. Rep. 815, and note.

## DAVIE v. DAVIS.

[108 NORTH CAROLINA, 501.]

**JUSTICE'S JUDGMENT — NONSUIT — RES JUDICATA — EVIDENCE.** — A justice's judgment dismissing an action is not necessarily a nonsuit; and under a plea of *res judicata* to such judgment, evidence as to whether or not the merits were inquired into upon rendering it is admissible.

**JUSTICE'S JUDGMENT — RES JUDICATA.** — A justice's judgment on the merits is conclusive on the parties, not only as to all matters pleaded, but as to all which could or should have been pleaded.

**ACTION on a bond.** On the trial, plaintiffs introduced a bond signed by one Whitfield and defendant Davis, which had been assigned to them. Defendant Davis admitted his signature, but claimed that the bond was void, as there was no payee or obligee named therein when he signed it. The justice's judgment is set out in the opinion. On appeal from that judgment, the justice, as a witness for defendant, testified that he issued summons against the defendants Davis and Whitfield, and that at the trial, after hearing the evidence, he rendered judgment against Whitfield, and dismissed the case as to Davis; that his judgment was based solely on the ground that no payee was named in the bond when it was executed by Davis, and that he did not consider the fact that though the bond was void, Davis had put it in the power of Whitfield to borrow money thereon. An objection was made and overruled to the witness testifying as to what occurred at the trial, and his intention and reason for rendering the judgment, as the latter spoke for itself. Plaintiffs appealed.

*J. W. Graham*, for the appellants.

*L. C. Edwards and J. B. Batchelor*, for the respondent.

**CLARK, J.** The defendant pleaded that the matter was *res judicata*.

The former judgment was as follows: "This cause came on for trial; after hearing the evidence, it is adjudged that this warrant be dismissed as to Jonathan Davis"; and there was further judgment that the plaintiffs recover of the other defendant in that action the amount of the bond sued on, with interest and costs. The plaintiffs insisted that this was, as to Jonathan Davis, merely a judgment of nonsuit, and excepted to the admission of evidence as to the proceedings had before the justice. "Evidence of what a justice meant by the judgment in the former action is improper, for the entry must speak for itself. But it is otherwise as to the fact whether the merits were inquired into upon rendering it": *Ferrell v. Underwood*, 2 Dev. 111. This was cited and approved in *Justice v. Justice*, 3 Ired. 58; *Massey v. Lemon*, 5 Ired. 557; *Carr v. Woodleff*, 6 Jones, 400; and in other cases.

By consent, the court found the facts. It found "that there had been a trial on the merits upon the issues involved in this action, and a judgment heretofore had and rendered between the parties hereto, to wit, before a justice of the peace, in this county, on the 9th of June, 1890; that said justice rendered his said judgment solely and entirely upon the ground that it was proven to his satisfaction that there was no obligee named in the bond at the time the defendant executed the same; and that said justice did not hear or consider any equitable claim that the plaintiffs had against the defendant on account of his having executed said bond." This is conclusive, nor is the latter part contradictory. Unless the former proceeding was terminated by a nonsuit, the judgment therein is conclusive, and it is not a nonsuit necessarily because in form a judgment against the plaintiffs. It is found that the plaintiff failed on the merits, and though he may have had other merits or an equitable ground of maintaining the action, it was his own fault he did not present it on the trial, nor appeal from the judgment.

The judgment not being a nonsuit, it concludes the parties not only as to all matters pleaded, but as to all which could or should have been.

No error.

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JUSTICES' JUDGMENTS — RES JUDICATA. — A judgment rendered by a justice of the peace is, until reversed, conclusive, and a complete bar to another proceeding before another justice upon the same cause of action: *Marsteller v. Marsteller*, 132 Pa. St. 517; 19 Am. St. Rep. 604, and note. The judgment of a justice is conclusive as to the parties to the controversy; *Lewis*

v. *Fair*, 7 Ired. 422; 47 Am. Dec. 333, and note; *Emery v. Royal*, 117 Ind. 299. A justice of the peace may determine whether or not a criminal brought before him shall be dismissed: *People v. Ward*, 85 Cal. 585. But the state may appeal from the judgment of a justice of the peace discharging the defendant in a bastardy proceeding: *McCoy v. State*, 121 Ind. 160.

## GUDGER v. PENLAND.

[108 NORTH CAROLINA, 502.]

**SLANDER — WORDS ACTIONABLE PER SE — INFAMOUS OFFENSE.** — A charge that one has committed an infamous offense is actionable *per se*, and an offense is infamous which is punishable by imprisonment in a state prison. Hence a charge that one has committed perjury is actionable *per se*.

**SLANDER — COMPLAINT — PRIVILEGED COMMUNICATIONS.** — The plaintiff, in his complaint for slander, is not required to negative the idea that the words slanderous *per se* were uttered under such circumstances that defendant would be protected on the ground of privilege.

**SLANDER — PRIVILEGE, WHEN MATTER IN DEFENSE.** — When the words alleged as slanderous *per se* were uttered in the course of judicial proceedings, and were relevant and pertinent to the matter before the court, the fact that they were privileged must be set up in defense, unless such fact is affirmatively alleged in the complaint.

**SLANDER — COMPLAINT.** — Where a complaint in slander alleges that the slanderous words were spoken in a judicial proceeding, the fact alone that the slanderer was prosecutor in such proceeding is no absolute or presumptive protection against his liability.

**SLANDER — COMPLAINT — JUDICIAL NOTICE.** — Where a complaint in slander avers with sufficient certainty that defendant charged plaintiff with having sworn to a lie when examined as a witness in a certain criminal court at a certain term against certain persons, the appellate court will take judicial notice of the court mentioned, and that it had jurisdiction.

**SLANDER — COMPLAINT — SPECIFICATION OF SLANDEROUS WORDS.** — A complaint in slander need not set forth the language or substance of the testimony delivered by plaintiff as a witness at a trial, and referred to by defendant as constituting false swearing, unless the latter, when uttering the slanderous words, specified what plaintiff did swear, or in what particulars his testimony was false.

**SLANDER — COMPLAINT — PRAYER FOR DAMAGES.** — In an action of slander, a separate demand for damages need not be appended to each allegation setting up a cause of action.

**SLANDER.** Appeal from a judgment overruling a demurrer to a complaint in slander, alleging that defendant had orally charged plaintiff with having sworn to certain lies while being examined as a witness in a certain criminal case.

*W. J. Peele*, for the appellant.

*George A. Shuford*, for the respondent.

AVERY, J. The charge that one has committed an infamous offense, if false, is actionable *per se*: *Pegram v. Stolls*, 76 N. C. 349; *McKee v. Wilson*, 87 N. C. 300; *Sparrow v. Maynard*, 8 Jones, 195; *Eure v. Odom*, 2 Hawks, 52. It is not material whether the offense charged falls within the classification of felonies or misdemeanors, if, at the time when the words are spoken, a person convicted on indictment for it would be subject to infamous punishment: *Eure v. Odom*, 2 Hawks, 52. Imprisonment in the state prison is infamous punishment: *McKee v. Wilson*, 87 N. C. 300; *In the Matter of Hughes*, Phill. (N. C.) 62. Perjury is a misdemeanor, and is punishable by imprisonment in the penitentiary or in the county jail, and by fine not exceeding one thousand dollars: Code, sec. 1092. The contention of the defendant's counsel that the slanderous language appeared to have been used while a judicial investigation was progressing, and that under the principle stated in *Nissen v. Cramer*, 104 N. C. 574, the defendant is absolutely exempt from liability, finds no support in the admitted allegations of the complaint. It does not appear affirmatively in the complaint whether the language imputed to the defendant in either of the paragraphs of the complaint, setting forth specific language in which the charge was couched on different occasions, was spoken at the time of the trial of the criminal action, or afterwards. The plaintiff was not required to negative the idea that the words slanderous *per se* were uttered under such circumstances that the defendant would be protected from liability on the ground of privilege. The fact, if true, that the words were uttered in the course of a judicial proceeding, and were relevant and pertinent to the matter before the court, must be set up in the answer, if the defendant wishes to avail himself of it in his defense, unless it be gratuitously alleged in the complaint.

If it had been alleged that the language was spoken when the defendant was being examined as a witness on the trial of the indictment, still it does not appear that the defendant sustained such relation to the prosecutor as to furnish absolute or presumptive protection against liability: *Nissen v. Cramer*, 104 N. C. 574; *Shelfer v. Gooding*, 2 Jones, 175; *Briggs v. Byrd*, 12 Ired. 380. There is nothing alleged in the complaint that will support the contention of the defendant's counsel that the action cannot be maintained.

We think that it appears with sufficient certainty that de-

defendant charged the plaintiff with having sworn a lie when he was examined as a witness, in the criminal court of Buncombe County, on the trial, at a term mentioned, of an indictment (under section 1062 of the code) against the persons named for destroying Penland's fence. We take judicial notice of the existence of that court, and of the fact that it had jurisdiction of the offense mentioned: *State v. Ledford*, 6 Ired. 5; *State v. Brown*, 79 N. C. 642. It was not necessary that the plaintiff should set forth the language or substance of the testimony delivered by him and referred to by the defendant as constituting the false swearing, unless the defendant, when speaking the slanderous words, went on to specify what the plaintiff did swear, or in what particulars his testimony was false: *Smith v. Smith*, 8 Ired. 29.

A formal prayer for relief is not now essential in any complaint, and where a plaintiff specifies, in different paragraphs of the complaint, language used by the defendant at various times before the action was brought, but amounting in each instance, in all of its varied forms, to a charge that the plaintiff swore falsely as a witness on the trial of a certain suit before a court of competent jurisdiction, it is not necessary to append to each specification a separate demand for damage: *Harris v. Sneed*, 104 N. C. 369. Though an action could be maintained and damages recovered by proving the utterance of the slanderous words set forth in more than one paragraph of a complaint, the language used in each instance amounting to a charge of perjury in the same judicial proceeding and at the same time, it does not follow that it is essential in this case that a separate demand for damage should be appended to each of such paragraphs: *Harris v. Sneed*, 104 N. C. 369. The rule referred to in the demurrer is not susceptible of the construction that counsel seem to have given to it.

For the reasons given, we think that the demurrer was properly overruled. There was no error.

Affirmed.

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**SLANDER — WORDS ACTIONABLE PER SE — CHARGING AN INFAMOUS OFFENSE.** — Words charging a criminal offense are actionable *per se*: *Aylee v. Wright*, 17 Ohio St. 238; 93 Am. Dec. 615, and note; *Roberts v. Ramsey*, 86 Ga. 432; *Noyes v. Hall*, 62 N. H. 594. Words charging a person with perjury are actionable *per se*: *Commons v. Walters*, 1 Port. 377; 27 Am. Dec. 635; *Gilman v. Lowell*, 8 Wend. 573; 24 Am. Dec. 96, and extensive note; *Nissen v. Cramer*, 104 N. C. 574; *Davis v. Davis*, 87 Tenn. 200; *Weil v. Israel*, 42 La. Ann. 956.

**SLANDER — PRIVILEGED COMMUNICATIONS.** — In slander, the issue that the words spoken were a privileged communication is not raised by a general denial; it must be pleaded: *Hess v. Sparks*, 44 Kan. 465; 21 Am. St. Rep. 300, and note. Privileged communication is a matter of law: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726.

Words spoken in the course of a judicial proceeding, though actionable *per se*, are *prima facie* privileged: *Calkins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738, and note; *Bradley v. Heath*, 12 Pick. 163; 22 Am. Dec. 418, and note.

## KING v. RHEW.

[106 NORTH CAROLINA, 606.]

**HUSBAND AND WIFE — TRUST IN FAVOR OF MARRIED WOMAN — CONVEYANCE BY HUSBAND ALONE — ADVERSE POSSESSION.** — Where land is conveyed to a trustee for the sole and separate use of a married woman, and the husband subsequently conveys the same by deed executed by him and his wife, in which her name only appears in the attestation clause, and in which no reference is made to the trustee nor the trust estate, the deed is that of the husband alone, and does not convey the title which is vested in the trustee, subject to be lost to him and to vest in the purchaser by virtue of the adverse possession of the latter.

**HUSBAND AND WIFE — TRUST IN FAVOR OF MARRIED WOMAN — CONVEYANCE BY HUSBAND ALONE — ADVERSE POSSESSION AGAINST TRUSTER.** — Where land is conveyed to a trustee for the sole and separate use of a married woman for life, and at her death to be divided between the surviving children of her marriage, the title vests in the trustee; and though a conveyance by the husband alone will not convey the title, still, it may vest in the purchaser by means of adverse possession against the trustee; and when his title is thus barred, the *cousins que trust* for life, as well as in remainder, are also barred.

*D. L. Russell*, for the appellants.

*Junius Davis*, for the respondent.

**SHEPHERD, J.** The land in question was conveyed on the 25th of April, 1863, to one "Robert Wood, Jr., and his heirs and assigns," in trust, "for the sole and separate use, occupation, and enjoyment of Charlotte King during her natural life, and at her death to be equally divided between any children she may leave her surviving, born of her intermarriage with her present husband, share and share alike, and to be in no wise liable to be sold or taken for the debts of her said husband." Charlotte King died in 1889, and the plaintiffs are the only children born of her intermarriage with Isaac W. King, her said husband.

The said King, in 1869, conveyed the land, for a valuable consideration, to one Ann Eliza Orrell, and the defendant

claims by mesne conveyances from her. Charlotte King executed the deed with her husband, but her name does not appear in it anywhere, except in the attestation clause, nor does the deed refer in any way to the trust estate of Wood.

It is admitted that the defendant "has been in the actual and open possession of the said land since the date (September 16, 1880) of the deed to him (by one Chadwick), claiming adversely under said deed, and [that] such possession was adverse to the plaintiffs, unless, in law, it was not adverse."

The first question to be considered is, whether the deed executed by King and wife (the trustee being no party thereto) conveyed any interest of the wife in the said land, so that the trustee would have been prevented, in equity, from asserting his legal title during the nine years' occupancy of the defendant.

In *Agricultural Bank v. Rice*, 4 How. 241, it was said that, "in order to convey by grant, the party possessing the right must be grantor, and use apt and proper words to convey to the grantee; and merely signing, sealing, and acknowledging an instrument in which another person is grantor is not sufficient. The deed in question conveyed the marital interests of the husband in these lands, and nothing more."

"In the following cases the same rule is upheld as to deeds exactly similar to the one in question, where the party signed, sealed, and acknowledged it, and was only named in the attestation clause: *Lufkin v. Curtis*, 18 Mass. 223; *Leavitt v. Lamprey*, 13 Pick. 382; 23 Am. Dec. 685; *Greenough v. Turner*, 11 Gray, 332; *Stevens v. Owens*, 25 Me. 94; *Cox v. Wells*, 7 Blackf. 410; 43 Am. Dec. 98; *Hall v. Savage*, 4 Mason, 273; *Bruce v. Wood*, 1 Met. 542; *Pierce v. Chase*, 108 Mass. 258; *Purcell v. Goshorn*, 17 Ohio, 105; 49 Am. Dec. 448; *Chapman v. Crooks*, 41 Mich. 597; *Wildes v. Van Voorhis*, 15 Gray, 148; *Harper v. Gilbert*, 5 Cush. 418; *Hubbard v. Knous*, 3 Gray, 567." See also 1 Bishop on Married Women, sec. 594, note; Malone on Real Property, 528-703.

In *Gray v. Mathis*, 7 Jones, 502, several of the foregoing cases are cited, and their doctrine clearly recognized and approved. These authorities abundantly show that Mrs. King was not a party to the deed signed by her, and that it was inefficacious to pass her estate in the said land.

Neither did her husband have any interest *jure mariti* which he could have conveyed, as the property was vested in the trustee for the "sole and separate use" of his wife: *Heathman v. Hall*, 3 Ired. Eq. 420; 2 Lewin on Trusts, 753, 756; 2

Perry on Trusts, 648. Even had there been no trust, he could not, under the act of 1848 (Rev. Code, c. 56), have conveyed his interest, unless the wife had joined in the conveyance, and this we have seen she failed to do. The deed, then, can only be regarded as that of the husband, and as he had no interest which he could have conveyed, the trustee could have maintained an action at any time against the defendant for the possession of the property. The defendant being thus exposed to an action on the part of the trustee (*Swann v. Myers*, 75 N. C. 535), and having been in the continuous possession for over seven years under his deed from Chadwick (which was color of title), and it being admitted that his possession was actually adverse, it must necessarily follow that the trustee's estate is barred. It is suggested, however, though not seriously pressed, that the possession of the defendant was permissive only; but there is no evidence of this, and we have but the naked deed of the husband and the admitted adverse possession of the defendant. Indeed, there is nothing in the case to show that Ann Eliza Orrell ever had possession of the land, nor does it appear that the defendant ever had any notice of the deed to Wood, the trustee; nor does he claim under it, nor is it part of his title. The only evidence as to the possession is the admitted fact that Rhew has had possession since 1880, claiming adversely to all persons; and even had he actual or constructive notice of the trust, the estate which he acquired by disseisin would not be subject to it, as it is well settled that "a disseisor is not an assign of the trustee, either in the *per* or *post*, for he does not claim through or under the trustee, but holds by a wrongful title of his own, and adversely to the trust": 1 Lewin on Trusts, 250; 1 Perry on Trusts, 241, 346; *Benzein v. Lenoir*, 1 Dev. Eq. 225. This seems to be conceded by counsel. It is not insisted that the trustee would have been prevented from suing because of any equitable estoppel against Mrs. King; but we will remark, that although it had appeared that her husband had represented that the conveyance was in proper form, and she had simply remained silent while he received the purchase-money, she would not have been estopped: *Clayton v. Rose*, 87 N. C. 110. Neither would the consideration (other lands conveyed to her) have had this effect, whatever equitable remedy, if any, Mrs. Orrell might have had as to the land conveyed by her while it remained in the hands of Mrs. King: *Scott v. Battle*, 85 N. C. 184; *Clayton v. Rose*, 87 N. C. 110.



The estate of the trustee being barred, it is well settled that the *ce-tuis que trust* are barred also. This principle is admirably stated by Smith, C. J., in *Clayton v. Cagle*, 97 N. C. 801: "The annexation of trusts to the legal estate cannot arrest the operation of the rule, which, under the circumstances, ripens an imperfect into a perfect title, since during all this period the defendant was exposed to the action of the true owner [that is, the trustee], "and his negligence in bringing it tolls his entry and bars his action. The interest of the *cestui que trust* is, as against strangers to the deed, under the protection of the trustee, and shares the fate that befalls the legal estate by his inaction and indifference." See also *Herndon v. Pratt*, 6 Jones Eq. 327; *Wellborn v. Finley*, 7 Jones, 233; *Clayton v. Rose*, 87 N. C. 110; *Swann v. Myers*, 75 N. C. 585.

2. It is very earnestly insisted, however, that for the purposes of the trust it was unnecessary that the trustee should have taken any greater than a life estate, and therefore the remaindermen should not be barred. The principle has very generally been applied in cases of devise, where it is held that there is more room for construction to ascertain and carry into effect the intention of the testator, and accordingly the estate of the trustee has in some cases been enlarged or restricted to conform to the purposes of the trust. The rule, however, does not seem to be recognized in this state as applicable to limitations by deed: *Evans v. King*, 3 Jones Eq. 387. But conceding to the fullest extent, for the purposes of the discussion, that in such cases the estate of the trustee will be "abridged or cut down" to a life estate where the statute of uses would generally execute the ulterior limitations, or as expressed by the counsel, where the legal estate is unnecessary to subserve the purposes of the trust, we are nevertheless unable to see how it can avail the plaintiffs in this action. The land was purchased from a stranger for a valuable consideration, and the plain intention of the parties was, that the entire legal and beneficial interest should pass out of the grantor. Although the plaintiffs may not have been in existence at the time of the execution of the conveyance, the limitation could have been made by a deed (operating under our statute of 1715 as a common-law conveyance) directly to the wife for life, the inheritance during the contingency being either, as the old writers say, in abeyance or *in nubibus* (Co. Lit. 342), or according to Mr. Fearne (Contingent Remainders, 361), remaining in the grantor until the ascertainment of the per-

sons who are entitled to take. Under such a conveyance, however, the wife's estate would have been subjected to the marital rights of the husband, and the contingent limitations over could have been defeated by the destruction of the life estate. For the purpose, therefore, of securing her in the sole and separate enjoyment of her life estate, and presumedly to more effectually preserve the particular estate until the vesting of the remainders, the entire fee was conveyed to Wood and his heirs, in trust, for the purposes declared. Nothing remained in the grantor, and there being a valuable consideration, there could never have been a resulting trust in his favor: *Brown v. James*, 1 Atk. 158; *Perry on Trusts*, 158. In whom, then, was it necessary for the fee to vest? It could not be in the wife, because she took but a life estate; and it could not go to the children, even if in existence at the execution of the deed (and this does not appear); for it is well settled that if the use is contingent, the use is not *in esse* until the happening of the contingency upon which its vesting depends, and the statute will not execute it until then: *Chudleigh's Case*, 1 Rep. 126; *Sanders on Uses*, 110; 1 *Sngden on Powers*, 41; 4 *Kent's Com.* 241; 1 *Cruise's Digest*, 354. It will be observed that the limitation over is not to the children of Mrs. King, provided they survive her (in which case they would have taken a vested remainder, subject to have been divested afterwards by their death before that of their mother), but it is to "any children she may leave surviving her." During her life there could be no one to fill the description, and it is therefore quite clear that the uses were contingent. The fee, then, having passed out of the grantor, the wife taking but a life estate, and the children having but a contingent use which could not be executed by the statute, it must follow that until the death of Mrs. King it was necessary that it should have resided in the trustee and his heirs, and this is precisely where it was placed by the express terms of the conveyance.

In support of this conclusion, in reference to the facts of this particular case, we reproduce the language of Ruffin, C. J., in *Battle v. Petway*, 5 Ired. 578; 44 Am. Dec. 59. He says: "If the trust is not for a particular person only, but is limited over for other persons for whose protection the trustee's legal estate is necessary or highly useful, it is plain that the duty of the trustee to those entitled in future requires him to retain his estate, and therefore the court would not decree him to convey it." In our case it was not only useful, but, as we have

seen, it was absolutely necessary, that the fee should have abided in the trustee until the happening of the contingencies mentioned. The legal fee, then, being in the trustee, and having been barred by his inaction, as well as that of the equitable life tenant, there remained no estate to feed the remainders when they vested in the plaintiffs upon the death of their mother, and they are therefore not entitled to recover: *Herndon v. Pratt*, 6 Jones Eq. 327, and the other cases cited. The case of *Herndon* is strongly in point for the defendant. There, in the words of the defendant's counsel, the purposes of the trust were simply and purely to preserve the estate for the benefit of the contingent limitation to Mary Herndon and the others during the life of Robert and Julia, and according to the contention of the counsel for plaintiff, it was only necessary that the trustees should take an estate for the lives of those two, and that the statute could only run against that life estate. But the court held that the plaintiffs were barred, and they treated the question as too clear to admit of a doubt. If there had been anything in the point now raised by the counsel for plaintiffs, it certainly would not have escaped the attention of the eminent counsel who argued the case, or of the very able lawyer and distinguished jurist who delivered the opinion. Whatever opinion may be entertained by other courts, it is yet too well settled in this state to admit of argument, that, where the trustee is barred, the *cestuis que trust* in remainder, as well as those for life, are barred also: *Herndon v. Pratt*, 6 Jones Eq. 327, and *Swann v. Myers*, 75 N. C. 585.

Under the view we have taken of the law as settled by this court, and its application to the present case, it is hardly necessary to review the authorities cited by the plaintiffs from other states. We will remark, however, that *Ellis v. Fisher*, 3 Sneed, 231, 65 Am. Dec. 52, related to a trust created by devise, and the same is true of the quotation from *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168, cited by counsel. In *Nicoll v. Walworth*, 4 Denio, 385, the estate of the trustee was but for life, and the decision is explained by Danforth, J., in *Bennett v. Garlock*, 79 N. Y. 302; 35 Am. Rep. 517. In this latter case the doctrine as contended for by the plaintiffs was recognized as to deeds, but its application was denied because, as in the present case, it was necessary for the purposes of the trust that the trustee should take the fee. The passage cited from Perry on Trusts, 858, to the effect that the statutory bar ought not to run against the *cestuis que trust* in re-

mainder, is not sustained in the single case (*Parker v. Hall*, 2 Head, 641) cited in its support. The case only decides that the *cestuis que trust* are not barred where the trustee estops himself from suing by selling the property, and thus "uniting with the purchaser in a breach of the trust." "The wrong," says the court, "is to the *cestuis que trust*, and not to the trustee," and "he could not sue or represent them." It has never been insisted that the bar is effective against the *cestui que trust*, except in cases where the trustee could have sued, as in this case, and failed to do so.

For the reasons given, we are of the opinion that his honor committed no error in holding that the plaintiffs were barred, and could not recover.

Affirmed.

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DEED, WHETHER BINDING ON ONE NOT NAMED AS GRANTOR THEREIN. — The question as to whether or not a person is bound and estopped by a conveyance signed and sealed by him, but in which his name does not appear as a grantor, is discussed at considerable length in the note to *Payne v. Parker*, 25 Am. Dec. 226. At that writing, the cases appear to have been about equally divided on the subject; and though there is still an irreconcilable conflict of authority, we think it safe to assert that the weight of the adjudicated cases, if not the better reasoning, is in support of the rule that the person in whom the title to land is vested must use appropriate words as a grantor, to convey the estate; that signing, sealing, and acknowledging a deed by one party in interest, in which another than such party purports to be the only grantor, will not convey the former's estate.

With only a passing notice of the cases cited in support of and against this rule in the note mentioned, we shall proceed to add the later authorities. The doctrine is announced in *Harrison v. Simons*, 55 Ala. 510, that where several parties are named as grantors in a deed to which their signatures and seals are attached, another person whose signature and seal is affixed thereto, but who is not named as a grantor therein, is not one of the grantors, and the deed does not pass his interest in the land. In a subsequent case it was decided that a conveyance of land which purports to be executed by the wife only as grantor, and which is only signed by the husband, while the names of both are affixed as grantors in the certificate of probate, is inoperative to pass the title of the husband: *Gaston v. Weir*, 84 Ala. 193. A conveyance by a married woman of land belonging to her as her statutory separate estate, duly executed, acknowledged, and certified, and signed by her husband, but in which he is not named as a grantor, and which contains no words of conveyance sufficient to pass or to constitute evidence of an intention to pass his interest in such land, is merely the void deed of the wife, to which the husband is not a party, and to which his concurrence is not expressed in the manner prescribed by the statute: *Hammond v. Thompson*, 56 Ala. 589; *Blythe v. Dargin*, 68 Ala. 370; the latter case holding, in addition, that such deed could not be enforced in equity as a contract to convey, though the purchase-money had been paid, and possession taken and continued thereunder for five years. In *Peabody*

v. *Hewitt*, 52 Me. 33, 53 Am. Dec. 486, the rule is announced that if one jointly with another signs, seals, and delivers a conveyance supposed and intended to be a perfect deed, and his name does not appear as a grantor therein, his interest in the land does not pass by the deed.

A deed which some of the parties named therein as grantors acknowledge as such, but which is not signed by them, will not convey their interest; and a conveyance in which a number of persons are mentioned as grantors, and which is simply signed and acknowledged as their deed by others not mentioned therein as grantors, will not pass the title of those not so named therein: *Adams v. Medsker*, 25 W. Va. 127.

The mere signing, sealing, and acknowledging a deed by a wife, in which her husband purports to be the only grantor, will not convey her interest in the estate: *Bradley v. Missouri etc. Ry Co.*, 91 Mo. 493; *Batchelor v. Brereton*, 112 U. S. 396; affirming *Agricultural Bank v. Bice*, 4 How. 225; cited in the note to *Payne v. Parker*, 25 Am. Dec. 226. Consequently, where the wife of the grantor is the owner of one fifth of the land described in the conveyance, and she joins only in the *testatum* clause, and in the execution of the deed, the deed is not effectual to pass her interest, and only the husband's title passes to the grantee: *Cincinnati v. Lessee of Newell*, 7 Ohio St. 37. And a deed duly signed, sealed, and acknowledged by a married woman and her husband, but which does not mention her name as one of the grantors therein, will not pass any interest which she may have in the land sought to be conveyed, nor will it relinquish her contingent right of dower therein: *Laughlin v. Fream*, 14 W. Va. 322. A deed executed by the husband of a tenant for life, in which the latter joins in a relinquishment of dower merely, will not convey her interest in the estate: *Magness v. Arnold*, 31 Ark. 103.

Under the Illinois statute, however, it is decided that where a husband conveys his estate, and his wife duly signs and acknowledges the deed, although she is not named therein as a grantor, the deed is sufficient to pass the title and bar her contingent right of dower: *Johnson v. Montgomery*, 51 Ill. 185. So the deed of a married woman to her separate estate is effectual to pass the title, if duly signed and acknowledged by her and her husband, although he is not named as a grantor in the deed: *Miller v. Shaw*, 103 Ill. 277; *Schley v. Pullman Car Co.*, 120 U. S. 275. In that state it was also decided that a conveyance of the homestead by the husband, in which the wife was not named as a grantor, but which she duly signed and acknowledged jointly with her husband, was sufficient to pass the title: *Yocum v. Lovell*, 111 Ill. 212. On the other hand, it has been decided in Iowa that a conveyance of the homestead by the husband, in which the wife does not join as a grantor, or to which her name is affixed by a third person without authority, is void, and will be set aside at the suit of the wife: *Ellis v. Gridley*, 27 Iowa, 376; *Bruener v. Bateman*, 66 Iowa, 488. The doctrine announced in *Car v. Wells*, 7 Blackf. 410, that the deed of a married woman, in order to pass her interest in land, must contain apt granting words in the granting clause in the deed, is affirmed in *Scheidt v. Leibekula*, 51 Ind. 38-41. A deed of the land of a married woman, in which she and her husband are named as grantees, and signed only by the wife, but subsequently acknowledged by both husband and wife, and then delivered, is void, and passes no title to the grantee: *Miller v. Ruble*, 107 Pa. St. 395.

The rule was enunciated in Massachusetts, in an early case, that a married woman, in order to bar her right of dower or pass her interest in real estate, must not only join her husband in executing the deed, but that the deed so

executed must contain apt words of grant or release by her: *Oslin v. Ware*, 9 Mass. 218; 6 Am. Dec. 56. This rule was strictly adhered to in that state, as shown by the citations in the note to *Payne v. Parker*, 25 Am. Dec. 226, and by *Greenough v. Turner*, 11 Gray, 334. While this rule might be followed if the precise question were before the court, still, it has been decided in subsequent cases in that state that the assent of the husband to his wife's deed of her land is sufficiently shown to pass the title by the insertion of his name in the attestation clause, in token of his relinquishment of all interest in the premises conveyed, and with his signature and seal attached: *Chapman v. Miller*, 128 Mass. 269; *Hills v. Bearse*, 9 Allen, 408; *Child v. Sampson*, 117 Mass. 62.

An exactly contrary and irreconcilable doctrine to that announced in the foregoing cases is proclaimed in *Hrouakt v. Janks*, 66 Wis. 252. It is there decided that a deed granting land is effectual to pass the title and interest of a person executing it, though he is not named therein as a grantor. This case does not cite any authority in favor of or supporting the ruling made, although an effort is made to distinguish it from the cases maintaining the contrary rule. We fail to note the distinction.

In the late case of *Boane v. Summerlin*, 19 Fla. 508, it was decided that the deed of a married woman conveying her separate property, containing the name of herself only as the grantor, and omitting that of her husband, who joined her in signing and acknowledging it, is sufficient as his assent and joining with her under the statute to convey the estate of the wife. This case is decided upon the authority of the Massachusetts cases cited *supra*, and *Woodward v. Beaver*, 38 N. H. 29, and *Stone v. Montgomery*, 35 Miss. 63, — all of which announce a similar rule. In *Matis v. Rolfe*, 53 Ark. 107, a deed of the wife's land was signed by both husband and wife, while the granting clause recited that the husband granted the land, followed by a clause reciting that "Now, I, M. H., wife of the said L. H., for the consideration above set forth, do hereby assign, release, relinquish, and quitclaim all my right, title, interest, and ownership to the said grantee," and the court decided that the deed operated to convey the wife's interest in the estate, as such relinquishment by her referred to the property elsewhere described in the deed.

Where two of three heirs receive their portion of their ancestor's land, and in consideration therefor, and at the request of the third heir, convey the remaining one third of the land to the wife of the latter, with covenant of general warranty, without naming him as one of the grantors in the body of the deed, which he signs and acknowledges with his co-heirs, the deed is sufficient to convey the title to his interest to his wife, who, after his death, may convey it to a third person, free of the claims of the husband's heirs: *Hurgis v. Dismore*, 86 Ky. 653.

In connection with the subject of this note, it may not be amiss to state that a forged deed is utterly void, and does not convey any title to the grantee, although he may be an innocent purchaser for value without notice of the forgery: *Oole v. Levi*, 44 Ga. 579; *Reck v. Clapp*, 98 Pa. St. 581; *Austin v. Dean*, 40 Mich. 386; *Haight v. Vallet*, 89 Cal. 245; *post*, p. 000.

A deed purloined from the grantor, or obtained from him by fraud without his knowledge or consent, does not divest his title, nor pass it even to a subsequent purchaser from the grantee for value and without notice: *Henry v. Carson*, 96 Ind. 412; *Tisher v. Beckwith*, 30 Wis. 55; 11 Am. Rep. 576; *Bverts v. Agnes*, 4 Wis. 343; 65 Am. Dec. 314. In *Henry v. Carson*, 96 Ind. 412, it was said that "a deed delivered without the knowledge, consent,

or acquiescence of the grantor is no more effectual to pass title to the grantee than if it were a total forgery, although the instrument may be spread upon the record, and innocent purchasers are not protected."

A conveyance to or by a person whose existence and identity is known or can be ascertained will pass his title, although the conveyance is made and executed under a fictitious name: *Wilson v. White*, 84 Cal. 239; *David v. Williamsburgh etc. Ins. Co.*, 83 N. Y. 265, 33 Am. Rep. 419; *Fallon v. Kehoe*, 38 Cal. 44; 59 Am. Dec. 317.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OREGON.**

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**THOMPSON-HOUSTON ELECTRIC COMPANY v. SIMON.**

[20 OREGON, 60.]

**COMMON CARRIERS — CLASSIFICATION.** — A common carrier may be either a carrier of passengers or of freight, or of both.

**EMINENT DOMAIN — ELECTRIC OR HORSE-POWER STREET-RAILWAYS CAN- NOT EXERCISE RIGHT OF.** — A statute investing "a corporation organized for the construction of any railway" with the power to exercise the right of eminent domain, and which appears upon its face as only contemplating and authorizing a railway to be constructed where none existed before, through the country, and requiring bridges, cuttings, embankments, tunnels, buildings for depots, engine-houses, repair-shops, and switches to enable it to properly conduct its business, and which can have little or no reference to corporations organized and operated as street-railways propelled by electricity or horse-power, and intended to accommodate local convenience for the transportation of passengers, does not authorize such railways to condemn private property for a right of way.

*Dolph, Bellinger, Mallory, and Simon, for the appellant.*

*Stott, Boise, and Stott, for the respondent.*

**LORD, J.** This is an action to condemn a right of way for a street and suburban railway operated for the carrying of passengers. A demurrer was filed to the complaint, which was sustained by the court below; and the plaintiff refusing to proceed, judgment was rendered therein, from which this appeal is taken. The contention of the plaintiff is, that our statute authorizing the condemnation of land for a right of way contemplates the exercise of such power as much by street and suburban railways propelled by horse-power or electricity as railroads where cars are propelled by steam.



The argument is, that section 3239, Hill's Code, which provides that "a corporation organized for the construction of any railway" may appropriate land for a right of way, by the use of the phrase "any railway," *ex vi termini* includes street and suburban railway corporations organized to transport passengers only, and propelled by horse-power or electricity, as well as railroads authorized to transport passengers and freight, and propelled by steam; that the terms of the statute, viewed as a whole, indicate and import that it was intended to authorize railway corporations to condemn lands for the use of their road, whether they were organized to carry passengers or freight, or both, or whether they were propelled by steam or other power. To strengthen the construction, that it is not necessary that the railway corporation, however propelled, should be formed to carry passengers and freight to entitle it to exercise the power of eminent domain, and condemn lands for its use, the language of section 3236 is relied upon as showing that this distinction is not observed with reference to navigation corporations authorized to construct portage railways, wherein it reads, "for the purposes of transporting freight or passengers across any portage on the line of such navigation, . . . in like manner and with like effect as if such corporation had been formed for such purpose." To this it is answered that every railway corporation for the construction of a railroad under the statute for the condemnation of lands is a common carrier, and that such a statute, being in derogation of common right, is not to be extended by implication. Section 3254 of the statute, authorizing the condemnation of land for a right of way, provides: "Every corporation formed under this chapter for the construction of a railway, as to such road shall be deemed common carriers, and shall be entitled to collect and receive a just compensation for transportation of persons or property over such road." The argument is, that as a common carrier is a carrier of goods for hire, and while a common carrier may carry passengers, and combine the two employments of carrying goods and passengers, as is almost universally done by railroads, yet as a corporation for the construction of a railway it cannot be deemed a common carrier unless it is formed to carry goods and passengers; that the legislature in delegating the right of eminent domain intended only that such railroads should be entitled to exercise it as were common carriers of freight and passengers; hence a corporation could not exercise the

right of eminent domain in the construction of a railway organized to transport passengers only, and not freight. Much of this argument is based on the technical definition of a common carrier, as one who undertakes for hire to transport the goods of such as choose to employ him from place to place; so that before a corporation can be deemed a common carrier, it must of necessity include in its business the transportation of goods or freight from place to place. There is usually in a railway act some sections which have the effect of putting the railway company on the footing of common carriers: 2 Rob. Pr. 534. But whether made so by general statute or by their charters, railroad companies are held to be common carriers: 2 Am. & Eng. Ency. of Law, 781. And it is said when they are made so by the express provision of a statute, such provision will be merely declaratory of the law as it already existed: Hutchinson on Carriers, sec. 67. A common carrier is such, because his duties partake of a public character. "To bring a person," says Judge Story, "within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*": Story on Bailments sec. 495. To constitute one, then, a common carrier, it is necessary that he should hold himself out as such. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment and is a public or common carrier of passengers.

"A common carrier of passengers," says Judge Thompson "is one who undertakes for hire to carry all persons, indifferently, who may apply for passage. Railroad companies, the owners of ships, ferries, omnibuses, street-cars, and stage coaches are usually common carriers of passengers": Thompson on Carriers of Passengers, 26, note 1.

It is true that carriers of passengers are not common carriers as to the persons of those whom they carry. But common carriers are classified as carriers of goods and as carriers of passengers. The reason is, their employment is *quasi public*, and the public have an interest in the faithful discharge of their duties. "Every common carrier," said Mulkey, J., "has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligation to carry passengers, and *vice versa*. So if he holds

himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will, nevertheless, be a common carrier": *Wiggins Ferry Co. v. East St. Louis U. R'y Co.*, 107 Ill. 451. A common carrier, then, may be either a carrier of passengers or freight, or both. The argument, then, that the plaintiff is not the kind of a corporation authorized to exercise the power of eminent domain because it is only a carrier of passengers, and not of freight, would not deprive the plaintiff of its character as a common carrier, and as such to be deemed within the statute. This would result in giving to the statute a construction which would include both classes of carriers, but not necessarily that such carriers should combine both employments; it might be engaged in carrying passengers or freight, or both, and still be deemed a common carrier.

But it is apprehended that the safer way to determine whether the word "railway" or "common carrier," as used in the statute, is to be confined to railroads operated by steam or railroads operated by other power, such as street-railways, is to look at the context and intent, and in that way ascertain whether the plaintiff is such corporation organized for the construction of a railway as is contemplated by the statute to be invested with the power to condemn lands for the use of its road. While it is true that the word "railway" may include railroads operated by steam as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street-railways for local convenience.

The plaintiff is an electric company, and as such, we know, belongs to the class of corporations operated as street-railways for the benefit of the local public. It was so understood at the argument, and the action is described as one to condemn a right of way for a street and suburban railway for the carrying of passengers. I take it, then, that we are to consider the plaintiff as belonging to this class, in determining whether it is such a corporation for the construction of a railway as is intended by the statute to be invested with the power to exercise the right of eminent domain. The statute provides (sec. 8239) that "a corporation organized for the construction of any railway," etc. (sec. 8240), "may appropriate so much of said land as may be necessary for the line of such road, not exceeding sixty feet in width, besides a sufficient quantity for

workshops," etc.; "and in case of a railway, a sufficient quantity of such land in addition to that before specified in this section for the necessary side-tracks, depots, water-stations, cuttings, embankments," etc.; "and such railway company shall have the right to cut down any standing timber in danger of falling upon its road," etc.; "may cross, intersect, join, and unite with any other railway," etc.; "and may make the necessary turnouts, sidings, switches, and other conveniences," etc. (sec. 3246); and "all streams and other waters on the line of such roads shall be safely and securely bridged, except," etc.; and (sec. 3254) "every corporation formed under this act for the construction of a railroad, as to such road shall be deemed a common carrier," etc. Few, if any, of these provisions have any reference to the class of corporations to which the plaintiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country, requiring bridges, cuttings, fillings, and embankments, and sometimes tunnels through hills and mountains, and also the building of depots and stations for the accommodation of freight and passengers, of engine-houses, repair-shops, switches, and turnouts, to enable the corporation to properly conduct its business.

A railroad corporation which must avail itself of the benefit of such a law to enable it to do these manifold things to build its railway and put it in operation may well be considered, from the public nature of its employment and the interest the public has in the proper conduct of its business, as a "common carrier," without a legislative declaration that it shall be deemed such. But it is plain that the provisions of such a law can have little or no reference to corporations organized and operated as street-railways, propelled by electricity or horse-power, and intended to accommodate local convenience for the transportation of passengers. They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel. This distinction as to the uses and purposes of each of

such class of corporations is thus stated in *Railway Co. v. City Railway Co.*, 2 Durie, 178, by Robertson, J.: "A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight; a street-railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street-railway is not a railroad." It is not enough that a railway is for a public use to authorize the taking of private property, but the taking must be for a public use within the scope of its undertaking and the object which it is to subserve.

To authorize railroads operated for such purposes to take the private property of the citizen and appropriate it to its use without his consent, the statutory authority for it must be plainly given; otherwise the right does not exist.

In view of these considerations, we do not think the provisions of the statute for the condemnation of a right of way applies to the plaintiff, so as to authorize it to take private property without the consent of the owner for its own use as a right of way.

It follows that the judgment must be affirmed.

#### ON REHEARING.

LORD, J. Further consideration of our statute for the condemnation of a right of way by a railroad strengthens the conviction that it does not extend to or contemplate the business class of railways to which the plaintiff belongs. Few, if any, of its provisions have any reference or application to it as such. Nor has any authority been cited or argument suggested, other than that the word "railroad" may include railways operated by steam or other power, to give it a different construction. In preference to construing the statute by this method, we thought the safer way to ascertain what the legislature intended was, as Shaw, C. J., in *Cleveland v. Norton*, 6 Cush. 380, "to take the entire provisions of the act, and ascertain, if possible, what the legislature intended." From that point of view, we thought it contemplated a railroad in the larger sense, and such as is considered a highway for travel and traffic, with its necessary adjuncts, and that it was to such railroads that the provisions had reference, and come within the design of the legislative grant conferring on such the right of eminent domain for the various things

specified as indispensable to effect the purposes of its organization and essential to carry on its business. Nor do we find that the authorities differ with us in this regard. Referring to some of the things which must be regarded as among the acknowledged necessities for operating such a railroad, Le Allen, J., said, in *In re New York etc. R. R. Co. v. Kip*, 46 N. Y. 552, 7 Am. Rep. 385: "But passenger depots, convenient and proper places for the storing and keeping cars and locomotives when not in use, proper, secure, and convenient places, having reference to the public interests to be subserved for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad to the proper prosecution of the business in the interests of the public. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant." In *State ex rel. Railroad Co. v. Railroad Comm'rs*, 56 Conn. 312, 313, Carpenter, J., said, "Depots for passengers and freight are essential parts of a railroad," and that "a railroad is incomplete without them." In speaking of the constitutional power of the legislature to authorize the taking of lands for the construction and operation of railroads, under the statutes of that state, Libby, J., said: "It rests upon the proposition, now well established, that railroads are public highways, the great thoroughfares for public travel and commerce": *Spofford v. Bucksport etc. Co.*, 66 Me. 39.

In a note in *Am. & Eng. R. R. Cas.*, p. 52, referring to Mr. Justice Harlan's summing up of the legal status of railroads as public highways for travel and traffic, etc., the writer says: "Whence it may be concluded, and these conclusions are sustained by authority, that, — 1. Railways are *quasi* public corporations, created for the purpose of conducting the business of common carriers of passengers and property upon their lines of railway, and for no other purpose; 2. As such they are engaged in a public service."

From the point of view that railroads are highways for public travel and commerce, it is indispensable to the accomplishment of the purposes of their organization that they should have depots for passengers and freight, and all the adjuncts necessary and essential to carry on their business.

By looking at the entire provisions of our statute, we find all these matters provided for, and within the design of the legislative grant, whence we conclude that our statute contemplated a railway in this larger or comprehensive sense, and intended to confer the power of eminent domain on such as are highways for the carriage of passengers and freight, and not the class of railways engaged in the business to which the plaintiff belongs.

Our conclusion is, that the motion must be denied.

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**CARRIERS, CLASSIFICATIONS OF.** — A carrier may be a carrier of freight: *Gilmore v. Carman*, 1 Smedes & M. 279; 40 Am. Dec. 96, and note; or a carrier of passengers: *Davis v. Button*, 78 Cal. 247; or a carrier of both freight and passengers: *Whitehead v. St. Louis etc. R'y Co.*, 99 Mo. 263. To bring a person within the description of a common carrier he must be engaged in a public employment: *Sawms v. Stewart*, 20 Ohio, 69; 55 Am. Dec. 445. For a definition of the term "passenger railway," see *Millvale Borough v. Evergreen R'y Co.*, 131 Pa. St. 1.

**EMINENT DOMAIN — RIGHT OF EXERCISE OF THE RIGHT.** — Street-railway companies using steam-motors cannot lay their tracks longitudinally upon the streets of a town or city, without the sanction of the legislature of the state expressly appearing, or arising from necessary implication: *Daly v. Georgia etc. R. R. Co.*, 80 Ga. 793; 12 Am. St. Rep. 286, and note. Compare *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 339; 67 Am. Dec. 471. Statutes conferring the power of exercising the right of eminent domain should not be enlarged by doubtful interpretation: *Bird v. Wilmington etc. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739, and note; note to *Gainessville etc. R'y Co. v. Hall*, 22 Am. St. Rep. 49. Such statutes must be strictly pursued: *Trester v. Missouri P. R'y Co.*, 23 Neb. 242; *State v. Scott*, 22 Neb. 628; *Burlington etc. R. R. Co. v. Johnson*, 38 Kan. 342; *Porter v. Durham*, 98 N. C. 329; *Matter of South B. R. R. Co.*, 119 N. Y. 142.

## FARQUAR v. FARQUAR.

[20 ORSON, 69.]

**JUDGMENT — FORMER DECREE HOW FAR CONCLUSIVE.** — A decree in an action of divorce between the same parties for the same cause of action bars the re-examination of the same facts in a subsequent case; still, when enough has occurred since the rendition of the first decree to entitle the plaintiff to relief, a decree will be granted in the subsequent action.

**ACTION for divorce.** The complaint charged cruelty and personal indignities. The answer consisted of a general denial, and the further defense of a prior decree between the same parties and upon the same facts alleged here. The plaintiff obtained a decree, and defendant appealed.

*W. R. Willis and C. A. Schlbrede*, for the appellant.

*J. C. Fullerton and George W. Colvig*, for the respondent.

PER CURIAM. It is manifest from an examination of this record that very much of the plaintiff's case is covered by the former decree between the same parties, and therefore cannot be considered again in this case. But there is enough which has occurred since that time to entitle her to a decree. The alienation between these parties seems to be permanent and irreconcilable. The feelings of both are deeply moved, one against the other. The defendant is engaged in the saloon business at Roseburg, and has been for many years, and appears to have entertained much suspicion concerning the fidelity and chastity of his wife. From his own testimony in the case, the "green-eyed monster" seems to be ever before him, and his frequent insinuations and statements concerning his wife's chastity show conclusively the state of his mind on the subject. It is unnecessary to recapitulate them or make a permanent record of them here. So far as this record discloses, these charges are without foundation. The plaintiff appears to have been industrious, and to have manifested at all times a becoming solicitude for the welfare of her children.

We do not find any error in this decree appealed from, and it is affirmed.

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JUDGMENT—FORMER DECREE HOW FAR CONCLUSIVE.—Whether a judgment will bar another action between the same parties depends upon whether the thing demanded in the new suit is the same, and founded on the same facts, as the first suit decided: *Slocumb v. De Lizardi*, 21 La. Ann. 355; 99 Am. Dec. 340, and note; *Bens v. Hines*, 3 Kan. 390; 89 Am. Dec. 594, and note. As to when facts are not *res judicata*, see extended note to *Lea v. Lea*, 96 Am. Dec. 772.

A decree dismissing a libel for divorce is not conclusive in a subsequent action of facts then at issue: *Hubert v. Fera*, 99 Mass. 193; 96 Am. Dec. 732, and note.



## MORRILL v. MORRILL

[20 OREGON, 94.]

**JUDGMENT — WHAT IS COLLATERAL ATTACK.** — A collateral attack on a judgment or decree is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying it. The fact that the parties are the same, and that plaintiff seeks to attack the decree by allegations in the reply to the answer, does not change the rule, or make the attack any the less a collateral one.

**CO-TENANCY — POSSESSION OF ONE CO-TENANT IS POSSESSION OF THE OTHER.** — The possession of land usually follows the legal title, where no adverse possession is shown, and the possession of one co-tenant, in the absence of an ouster, will inure to the benefit of his co-tenant.

**JUDGMENT — CONCLUSIVENESS OF.** — A judgment of a court having jurisdiction is binding on the parties, no matter how erroneous it may be, until reversed or annulled.

**JUDGMENT CANNOT BE COLLATERALLY ATTACKED FOR ERRORS.** — When a court has jurisdiction of the subject-matter and of the parties, its judgment cannot be impeached collaterally for errors of law or irregularities in practice.

**PRACTICE — PLEADING.** — A party cannot aid his complaint by departing from the cause of action stated therein, and alleging another and different one in his reply to the answer.

**JUDGMENT — WHEN BINDING IN COLLATERAL PROCEEDINGS.** — When a party has an opportunity to present his defense and neglects to do so, the judgment or decree against him is binding in a collateral proceeding.

**JUDGMENT IN PARTITION — CONCLUSIVENESS OF.** — A decree in partition is conclusive between the parties, as to the title to the land, and the fact that they are tenants in common. Each of them is thereby estopped from attempting to show in another proceeding that he was holding the premises adversely to his co-tenant, or that he had no interest therein at the date of the rendition of the decree in partition.

**JUDGMENT CANNOT BE COLLATERALLY ATTACKED FOR FRAUD.** — A domestic judgment of a court having jurisdiction of the subject-matter and of the parties cannot be questioned collaterally for fraud *aliunde* the record, by the parties or privies.

**JUDGMENT IN PARTITION — COLLATERAL ATTACK.** — When a decree in partition is made by one referee, instead of three as provided by statute, the irregularity cannot be inquired into in a collateral proceeding.

**ACTION** to quiet title to lot 8, block 116, in the city of Portland. Plaintiff claimed to own the land in fee, and to be in possession of said lot. The only fact necessary to an understanding of the opinion, and not given therein, is the following agreement: —

“In consequence of mutual agreement with Mrs. Ida Morrill, I declare under oath that I withdraw my individual right of the title of an individual one-third interest in lot 8, block

116, in the city of Portland, allowed to me by law of the court.

[Signed]

"ELI MORRILL.

"PORTLAND, OR., August 9, 1879."

Judgment for the plaintiff, and defendants appeal.

*J. W. Whalley*, for the appellant.

*A. H. Tanner and R. R. Giltner*, for the respondent.

BEAN, J. It is conceded by respondent that if the decree in the partition suit of *Morrill v. Morrill* is valid and binding on her, this case should be reversed. Briefly, the facts concerning the partition suit are these: In August, 1882, the defendant herein, Eli Morrill, commenced a suit for partition in the circuit court for Multnomah County, Oregon, against the plaintiff in this suit. The complaint was in the usual form, alleging that he and plaintiff were tenants in common and in possession of lot 8 in block 116 in the city of Portland, setting out the interests of the respective parties, and praying a partition thereof. A summons being duly issued and served, the plaintiff appeared by her counsel, and filed an answer, in which she denied the possession of the premises by herself and defendant, and alleged as a defense that she was then, and had been since the first day of March, 1878, in the actual and exclusive possession of all the property, and that her possession was not joint with that of plaintiff or any other person.

A reply being filed denying the new matter alleged in the answer, the cause was referred to a referee to report the facts and the law to the court. In January, 1883, the parties, by their respective attorneys, appeared before the referee for the purpose of taking testimony. The plaintiff offered in evidence a certified copy of the judgment roll in the divorce case of *Morrill v. Morrill*, and the following stipulation of the parties was entered into: "It is hereby stipulated by the parties, that up till the 4th of February, 1882, both plaintiff and defendant occupied the premises described in the complaint; that since that time the defendant has been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant nor any person for him has actually occupied said premises, or any part thereof, since February 4, 1882, as a home or otherwise; that both before and since February 4, 1882, and up to the present time, both plaintiff and defendant have paid taxes and street im-

provements according to their respective interests. It is understood that this stipulation shall not be so construed as to affect the rights of either party as a tenant in common. It is further agreed that the referee may make personal inspection and investigation of the premises in question, and from the facts thus obtained report to the court (if this suit can be maintained),— 1. Whether the property can be divided; 2. If it can, then how division shall be made; 3. If it cannot be divided, then recommend a sale."

On May 4, 1888, the referee filed his report, the findings of fact and conclusions of law being in favor of defendant; and he also reported that, pursuant to the stipulation of the parties, he had made personal inspection of the premises, and found that they could be divided without injury to the rights of either. The report recommended that the north nineteen feet of the lot be set off to defendant, and the south thirty-one feet to plaintiff, each portion being particularly described in the report. Motions were made to confirm and set aside this report by the respective parties to the suit.

On June 7, 1888, the court being fully advised, and the counsel of the respective parties consenting thereto in open court, a decree was entered confirming said report; and it was adjudged and decreed that plaintiff and defendant were tenants in common, and in possession of the property; that plaintiff was the owner of an undivided two thirds thereof, and defendant of the remaining one third; that the premises could be partitioned according to the respective interests of the parties, without prejudice to the rights of either, and confirming the partition as made by the referee, particularly describing in said decree the portion set off to the respective parties. It is argued on behalf of respondent here that the decree in the partition suit of *Morrill v. Morrill* is void,— 1. Because defendant was not in possession of the land sought to be partitioned at the commencement of the suit, and such fact, it is claimed, appears from the record thereof; 2. That the stipulation entered into by her attorney was without her knowledge and against her instructions, and was done for the purpose of defrauding her; 3. That no referees were appointed to partition the land as by law required.

It is first important to determine whether this is a direct or collateral attack on this decree. The contention of respondent is, that it is a direct attack, and therefore no presumptions are to be invoked in order to sustain it. The complaint contains

no allegations concerning this decree, but the first mention thereof is in the answer, where defendant pleads it as an estoppel. The plaintiff then seeks to avoid its effect by averring in the reply matters which she claims are sufficient to invalidate it. This is undoubtedly a collateral attack. It is an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree. A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree: 12 Am. & Eng. Ency. of Law, 147 j. The fact that the parties are the same, and that the plaintiff seeks to attack the decree by the allegation of the reply, cannot change the rule, or make the attack any the less a collateral one. The first objection to the validity of this decree is based upon the stipulations of the attorney, "that the defendant in the partition suit has, since February 4, 1882, been in the actual, exclusive occupancy of all of said premises, and has lived there as a home, and that neither the defendant nor any person for him has actually occupied said premises or any part thereof since February 4, 1882, as a home of otherwise."

The contention is, that a plaintiff, in order to maintain a suit for partition, must not only be a tenant in common, but in the possession of the land sought to be partitioned. If he has been ousted or disseised, and his co-tenant is holding adversely to him, the suit cannot be maintained, and many authorities are cited to that effect. It is urged that this stipulation shows that defendant was not in possession of these premises at the time he commenced this suit, but had been ousted by the plaintiff long prior thereto. It may be doubted whether such a construction can be put upon the language of the stipulation, since possession usually follows the legal title, where no adverse possession is shown, and the possession of one tenant in common of the land, in the absence of an ouster, will inure to the benefit of his co-tenant: Freeman on Cotenancy and Partition, sec. 167. "Actual, exclusive occupancy" by the defendant in the partition suit may not have been inconsistent with the title of her co-tenant; but however that may be, it was a question for the court before whom the suit was pending, and its decision, however erroneous it may have been, is binding on the parties until reversed or annulled in some proper proceeding: *Atkins v. Kinnan*, 20 Wend. 241; 32 Am. Dec. 534; *Voorhees v. United States Bank*, 35 U. S. 449; *Dolph v. Barney*,

5 Or. 191; *Woodward v. Baker*, 10 Or. 491; *Norton v. Harding*, 8 Or. 361; *Hill v. Cooper*, 8 Or. 254. After a court has acquired jurisdiction, it has a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent court with admitted jurisdiction of the subject-matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because, forsooth, it was mistaken, either as to the law applicable to the facts before it or to the facts themselves. Baldwin, J., in the case of *Voorhees v. United States Bank*, 35 U.S. 449, speaking on this subject, says: "The error of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be made more reasonable than that the person who complains of an injury done him should avail himself of his legal remedy in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitations on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot directly do in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment irreversible by a superior court cannot be declared a nullity by any authority of law. If after its rendition it is declared void for any matter which can be assigned for error, only on a writ of error or appeal, then said court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails that any proceedings of a court of competent jurisdiction can be declared to be a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in the Union may exercise the same right, from which our own judgments or process would not be exempt." We need not pursue the examination of this question any further, for the principle is so well settled that it is said to be an axiom of the law, that when a court has jurisdiction of the subject-matter and the parties, its judgments cannot be impeached collaterally for errors of law or irregularity in practice: *Cooper v. Reynolds*, 10 Wall. 308; *Sibley v. Waffle*, 16 N. Y. 180.

On the argument of this case much stress was laid upon

the effect of the alleged agreement of defendant concerning the property in dispute, made in August, 1879; and it was claimed that by virtue of that agreement plaintiff became the equitable owner of this property. There are two reasons, either of them sufficient, in our opinion, why plaintiff can claim nothing by virtue of this agreement in this suit. The first is, such agreement is not alleged in the complaint or in any way referred to therein. If plaintiff intended to rely upon this agreement, she should have so averred in her complaint; not having done so, she cannot aid the complaint by departing from the cause of suit stated therein, and alleging another and different one in her reply. In her complaint, plaintiff seeks to prevail by virtue of a purely legal title. This agreement, if executed by defendant, only gave her an equitable title at best. The other is, that this writing was executed, if at all, long prior to the commencement of the partition suit, and plaintiff should have availed herself of any rights it gave her in that suit: *Neil v. Tolman*, 12 Or. 289. If she neglected or failed, without some reasonable excuse, to produce all the evidence in her possession in that suit, it is now too late for her to be heard to complain. There must be an end to litigation, and where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences, when the judgment or decree is sought to be enforced against him in a collateral proceeding. The decree in the partition suit is conclusive between the parties as to the title to the land, and is a solemn adjudication that they were tenants in common therein: *Edson v. Munsell*, 12 Allen, 600; *Hancock v. Lopez*, 53 Cal. 362; *Freeman on Cotenancy and Partition*, sec. 530. The plaintiff is estopped by that decree from showing or attempting to show that she was holding the premises adversely to the defendant, or that he had no interest therein at the date of its rendition.

The next question in this case is, Can the decree in the partition suit be impeached for fraud? It is claimed by respondent that the evidence and findings of the referee show that the decree was obtained by fraud and collusion between her attorney in that suit and the defendant here. It is argued with much force and learning, that since defendants rely upon the particular decree as one of the muniments of their title, plaintiff should be permitted to show, if the facts are with her, that such decree was obtained by fraud and collusion between

her attorney and adversary; that since fraud vitiates every transaction, even a judgment, she ought to be permitted to treat this decree as invalid, when sought to be enforced or relied upon even in a collateral proceeding. This we believe is the first time this question has ever been before this court for decision. In the case of *Murray v. Murray*, 6 Or. 17, the court held that a judgment of a sister state could be attacked collaterally for fraud by a party when offered in evidence in the courts of this state, for the reason that the party sought to be affected thereby has no opportunity to attack it in our own courts by a direct proceeding, and should not be required to go into a foreign state to do so. As we have already said, this cannot be considered a direct attack upon this judgment. No reference is made to the judgment in the complaint. No facts are alleged upon which a court could base a decree annulling the decree or judgment. The plaintiff, in her complaint, claims title by good and sufficient mesne conveyances from the government of the United States, and by virtue of the statute of limitations. This is not sufficient to entitle her to attack this judgment: *United States v. Flint*, 4 Saw. 42; *Mayor v. Brady*, 115 N. Y. 599; *United States v. Throckmorton*, 98 U. S. 61.

It is a general rule at common law, that parties and privies to a judgment may not attack it collaterally for fraud. After a party has been duly served with process, it is his duty to see that such a judgment is not obtained against him, and if it is, he must take some proper proceedings to have it annulled. As long as it remains in full force and effect, the parties cannot treat it as invalid unless such invalidity appears upon the face of the judgment. It is true, fraud vitiates every transaction into which it enters, even a judgment; but such fraud must be made to appear in some appropriate proceeding known to the law. The statute points out ample methods by which a party may be relieved from such a judgment, — such as a new trial, review for error of law, an application to be relieved therefrom. And beyond the methods provided by statute, courts possess inherent powers, as has been said, “to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake.” These methods, however, must be resorted to. They give no countenance to the idea that a judgment wrongfully obtained may be completely ignored, and the rights of the parties again inquired into in a collateral proceeding: *Freeman on Judg-*

ments, sec. 834; *Davis v. Davis*, 61 Me. 395; *Murray v. White*, 58 Vt. 45; *Granger v. Clark*, 22 Me. 128; *Boston & W. Corp. v. Sparhawk*, 1 Allen, 448; 79 Am. Dec. 750; *Demerit v. Lyford*, 27 N. H. 541; *Krekeler v. Ritter*, 62 N. Y. 372; *Weiss v. Guérineau*, 109 Ind. 438; *Callahan v. Griswold*, 9 Mo. 775; *Mason v. Messenger*, 17 Iowa, 261. From these and many other authorities that could be cited, we take the law to be, that a judgment of a court of this state, having jurisdiction over the subject-matter and the parties, cannot be questioned collaterally for fraud *aliunde* the record, by the parties or privies.

The case relied upon by the respondent as announcing a contrary doctrine is *Mandeville v. Reynolds*, 68 N. Y. 528. This was an action on a judgment, the defense to which was based upon a satisfaction of the judgment of record, and upon an order of court ratifying that satisfaction. The plaintiff offered to show that the entry upon the docket and the order was obtained by fraud and collusion. The court held that such evidence was competent, and in the opinion there are statements to the effect that a judgment obtained by fraud could be attacked collaterally. This decision was made under the reform code of procedure of the state of New York, which permits equitable defenses to be pleaded in actions at law, and the court says: "The court acts upon the matters involved in the action, now, in a double capacity: as a court of law and a court of equity. As a court of equity, it meets the questions of the validity of the judgment, not as one of law, but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment, but as a direct assault, which, by the changing nature of the suit and trial, has become the main question, and legitimately before it for trial." In this state, the distinction between proceedings at law and in equity is still maintained: *Burrage v. Bonanza G. & Q. M. Co.*, 12 Or. 169. Authorities under the reform codes of procedure are therefore not applicable here.

We have so far treated this question on the theory that the evidence shows the decree to have been obtained by fraud, and our views as to the law render it unnecessary to examine the evidence; but in passing, we deem it proper to say that we cannot agree with counsel for respondent in their construction of the testimony. We think the evidence signally fails to show that the decree was obtained by fraud or collusion. It is also claimed that the stipulation in the partition suit was entered into by plaintiff's attorney without her knowledge



or consent. This claim is not sustained by the testimony. It is true, plaintiff says she knew nothing about the proceedings in the suit; but the attorney who appeared for her testifies that she was informed of and consented to every step taken therein, and the referee who made the partition says that she was present when he was examining the premises for the purpose of partitioning the same, that she knew what he was doing, and was consulted about the matter.

It is also claimed the decree is void because the partition was made by only one referee, and not three, as provided by statute. At most this was but an irregularity, and cannot be inquired into in this suit: *Cole v. Hall*, 2 Hill, 625; *Kinnier v. Kinnier*, 45 N. Y. 535; 6 Am. Rep. 182.

It follows, therefore, that the decree of the court below must be reversed, and a decree entered here in favor of defendants.

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**JUDGMENT—CONCLUSIVENESS OF.**—A domestic judgment of a court of general jurisdiction, upon a subject-matter within the scope of its power, is so conclusive that evidence *aliunde* will not be admitted to contradict it: *Wilkinson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. A judgment of a court of general jurisdiction is conclusive upon every other court until reversed: *Haines v. Flinn*, 28 Neb. 380; 18 Am. St. Rep. 785, and note; *Turner v. Staples*, 86 Va. 300; *National Bank v. Lester*, 73 Tex. 543; *Sabrinco v. Chamberlain*, 76 Tex. 625.

**JUDGMENT—COLLATERAL ATTACK FOR ERROR.**—A judgment cannot be collaterally attacked because of error in issuing an execution thereon: *Estate of Hanika*, 138 Pa. St. 330; 21 Am. St. Rep. 907, and note. All irregularities in the exercise of a court of general jurisdiction are cured by final judgment, and it cannot be collaterally attacked: *Apel v. Kelsey*, 52 Ark. 341; 20 Am. St. Rep. 183, and note; *Fischer v. Holmes*, 123 Ind. 525.

**JUDGMENT—WHEN CONCLUSIVE IN A COLLATERAL PROCEEDING.**—A judgment is conclusive on all defenses which could have been presented by the exercise of due diligence: *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note.

**JUDGMENT—COLLATERAL ATTACK FOR FRAUD.**—A sheriff's return, though false, cannot be impeached in a collateral proceeding to avoid a judgment authorized thereby: *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356, and note. In a collateral attack on a judgment, evidence of fraud not found on the judgment roll will not be received to avoid the judgment, though the fraud was in obtaining jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note. A sentence or decree is conclusive upon all parties, unless fraud or mistake be proved: *Texas v. Maloy*, 45 N. J. Eq. 68.

**CO-TENANT—EFFECT OF POSSESSION BY ONE CO-TENANT.**—The possession of one co-tenant is the possession of all: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note; *McGee v. Hall*, 26 S. C. 179; *Benefeld v. Albert*, 132 Ill. 605; *McClure v. Colyear*, 80 Cal. 378. Entry of one co-tenant is entry of all: *Hudson v. Cos*, 79 Me. 83; 1 Am. St. Rep. 288, and note.

**COLLATERAL ATTACKS UPON JUDGMENTS.**—The definition of a collateral attack given in the principal case, while it is not, so far as we are aware, supported by any authority, may, we think, be accepted as being as nearly correct as a general definition can be; but, like many other general definitions, it is of little or no aid in determining such special cases as are involved in doubt sufficient to require particular consideration. It seems too obvious to require mention, that a proceeding to annul, modify, or correct a judgment is a direct proceeding. It is pointed directly at a judgment, and if it is successfully maintained, the judgment, or some part of it, must succumb to the attack and cease to exist. But there have been many attempts to annul, modify, or correct judgments which have failed, and must again fail, if made under like circumstances, and many collateral attacks which have succeeded, and must again succeed, under similar conditions. Therefore, the question most worthy of attention is not, What is a collateral attack? but is, When may an attack, though collateral, be made with success?

When a judgment of a court of record is offered in evidence, it may appear, either from the judgment itself, or from the record of which it is a part, that the court did not have jurisdiction of the subject-matter of the action, or of the person of the defendant, or was without power to grant the relief which it undertook to grant, and therefore the judgment must either be denied all effect, or denied effect as to such portion of it as the court had no power to render: *Freeman on Judgments*, secs. 117, 120. The same result follows when a judgment of a court of special or limited jurisdiction is offered in evidence, and the subject-matter was not within the jurisdiction of the court, or it does not affirmatively appear that the court acquired jurisdiction over the parties against whom it rendered judgment: *Freeman on Judgments*, sec. 517; *Palmer v. Oakley*, 2 Doug. 433; 47 Am. Dec. 41; *Horan v. Wahrenberger*, 9 Tex. 313; 58 Am. Dec. 145; *Cooper v. Sunderland*, 3 Iowa, 114; 66 Am. Dec. 52; *People's S. B. v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 394. In these cases there is no attack upon the judgment, either direct or collateral. That which was offered as a judgment appears, on inspection, not to be what it was claimed to be, and no necessity arises for attacking it in any manner.

A motion to set aside a judgment falls within the definition given in the principal case of a direct attack, but the rules by which it is to be determined are sometimes those applicable to direct, and other times those applicable to collateral, attacks. If the motion is made during the term at which the judgment was rendered, the judge may grant it for any reason and upon any evidence which to him seems sufficient, and his action will not be reviewed by the appellate court: *Freeman on Judgments*, sec. 90; *Bolton v. McKinley*, 22 Ill. 203; *In re Marquis*, 85 Mo. 615; *Underwood v. Sledge*, 27 Ark. 295; *Volland v. Wilcox*, 17 Neb. 46; *Fraley v. Feather*, 48 N. J. L. 429; *State v. Sowders*, 42 Kan. 312; *Blum v. Wettermark*, 58 Tex. 125. If, on the other hand, the motion is made under a statute authorizing it to be granted, if made within a time and for a cause specified in such statute, it may well be regarded as a direct attack if made within such time and for one of such causes. Therefore the moving party is not bound by the record, and, notwithstanding its assertions to the contrary, may establish by competent extrinsic evidence the truth of the facts on which he bases his claim to relief: *Freeman on Judgments*, sec. 109; *McKinley v. Tuttle*, 34 Cal. 235; *Moscow v. Brigham*, 19 Vt. 457; *Gay v. Grant*, 101 N. C. 206. With respect to mere errors and irregularities of proceeding or decision not specified in

the statute as grounds for relief, the motion is doubtless controlled by the rules applicable to collateral attacks, and such errors and irregularities should be regarded as no longer open to consideration.

If a motion to set aside a judgment is not made during the term at which it was rendered, nor within the time and upon a ground specified by statute, the attack is still direct, if it be true that all proceedings instituted for the express purpose of annulling a judgment are direct attacks upon it; but the authorities do not agree as to whether the moving party is subject to the rules governing direct attacks or not. If the motion is upon the ground that the judgment is void, it may be entertained irrespective of the lapse of time; and if, from an inspection of the judgment roll, it appears that the judgment is a nullity, all courts agree that it should be set aside on the ground that it is not, in contemplation of law, a judgment, and that to permit it to stand on the records of the court as a judgment is liable to result in an abuse of the process of the court, and to occasion innocent persons to place a delusive reliance upon it: *Freeman on Judgments*, sec. 96; *Winslow v. Anderson*, 3 Dev. & B. 9; 32 Am. Dec. 651; *Pantall v. Dickey*, 123 Pa. St. 451; *People v. Greene*, 74 Cal. 409; 5 Am. St. Rep. 448; *Olney v. Harvey*, 60 Ill. 453; 99 Am. Dec. 530; *Ladd v. Mason*, 10 Or. 308; *Mills v. Dickson*, 6 Rich. 487; *Hanson v. Wolcott*, 19 Kan. 207; *Baker v. Barclift*, 76 Ala. 414. As to when a judgment is void in this extreme sense is a question upon which the courts cannot agree. The better rule, upon principle, is, we think, that the nullity of a judgment of a court of record, from whatever ground it may arise, should be apparent from an inspection of the judgment roll. If not confined to evidence found in such roll, the motion to vacate the judgment should at least not be granted upon oral or other testimony not upon file in the action, and of the evidence of which an examination of all the records, files, and official memoranda connected with the cause imparts no notice: *People v. Harrison*, 84 Cal. 607; *People v. Goodhue*, 80 Cal. 199; *Pettus v. McClannahan*, 52 Ark. 55. But the majority of the decisions, as we understand them, are in conflict with this rule, and permit a motion to vacate a judgment as void for want of jurisdiction to be entertained and granted at any time, if it appears to the court, from the evidence offered to it, though not found in the record, that the court did not acquire jurisdiction over the defendant, either because he was not served with process and did not appear in the action: *Shuford v. Cain*, 1 Abb. 392; *In re College Street*, 11 R. L. 472; *Cotton v. McGhee*, 54 Miss. 621; *Pettus v. McClannahan*, 52 Ala. 55; or, if his appearance was entered, that such entry was made by an attorney acting without authority: *Yates v. Horansen*, 7 Rob. (N. Y.) 12; *McKelway v. Jones*, 17 N. J. L. 246; *Kenyon v. Schreck*, 52 Ill. 382; *Latimer v. Latimer*, 22 S. C. 267; *Vilas v. Plattsburgh*, 123 N. Y. 440; 29 Am. St. Rep. 771; *Bradley v. Welch*, 100 Mo. 258; *Winters v. Means*, 25 Neb. 274; 13 Am. St. Rep. 489; and it has been held that on such a motion the return of the proper officer showing the service of process on the defendant may be contradicted and disproved: *Hanson v. Wolcott*, 19 Kan. 208; *Carr v. Commercial Bank*, 18 Wis. 56; *Hefner v. Guss*, 29 Minn. 168; *Stancill v. Gay*, 92 N. C. 455; *Parker v. Spence*, 61 Tex. 145; *Vilas v. Plattsburgh*, 123 N. Y. 40; 29 Am. St. Rep. 771.

So far as the cases, or any of them, affirm that a motion to vacate a judgment interposed after the time specified by statute is a direct attack thereon, and may therefore be supported by evidence not admissible on a collateral attack, we think them erroneous. In some of the states there is no doubt that a judgment, whenever and wherever relied upon, may be met and over-

come by extrinsic evidence showing to the satisfaction of the court that the tribunal pronouncing such judgment was without jurisdiction so to do, and that the judgment must, therefore, be disregarded and void. Where such is the law, it may be that a motion to vacate a judgment as void for want of jurisdiction, made at any time, may be sustained by extrinsic evidence; but even in these states, it would seem to be safer to leave the question of jurisdiction, where it is to be determined upon such evidence, to be decided in some action or proceeding the trial of which may be more formal, and the means of ascertaining the truth more adequate, than upon the hearing of a motion. But where the general policy of the law is to protect judicial proceedings from collateral assault, and to assure innocent purchasers that they may rely thereon, unless jurisdictional vices and infirmities appear from an examination of the record, it seems strange that a party should, by a mere motion, without any formal pleadings and without a regular trial, be able, after failing to resort to the remedies provided by statute, to have a judgment against him vacated, and the titles resting thereupon left without support. Conceding that the case is one in which the judgment ought to have been set aside as between the parties upon a reasonably prompt application, and that the moving party ought still to be granted relief, the circumstances may be, and often are, such that equitable terms should be imposed upon him; and such terms can be better regulated and enforced by an independent equitable action than upon proceedings by motion. Notwithstanding these considerations, there are, as we have already stated, courts which deem their authority to vacate judgments on motion as being inexhaustible, and which treat such motion, whenever made, as a direct proceeding in the hearing and determining of which evidence outside of the record is received and acted upon.

Irregularity is always a ground upon which a judgment may be attacked by motion to set it aside, and it has been said that a judgment is irregular whenever it is not entered in accordance with the practice and course of proceeding where it was rendered: *Dick v. McLaurin*, 63 N. C. 185; *Davis v. Shaver*, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; *Graff v. M. & M. Trans. Co.*, 18 Md. 364; *Mailhouse v. Inloes*, 18 Md. 329; *Browning v. Roane*, 9 Ark. 354; 50 Am. Dec. 218; *Walters v. Walters*, 132 Ill. 467; *Knott v. Taylor*, 99 N. C. 511; 6 Am. St. Rep. 547; *Knoc Co. Bank v. Doty*, 9 Ohio St. 506; 75 Am. Dec. 479; *Bowen v. Tory Mill Co.*, 31 Iowa, 460. But generally courts will not vacate their judgments on account of irregularities unless the application is promptly made, and the irregularity appears to have been prejudicial to the applicant: *Stancill v. Gay*, 92 N. C. 455; *Jones v. S. F. S. Co.*, 14 Nev. 172; *Roberts v. Allman*, 106 N. C. 391; *Freeman on Judgments*, sec. 97. In many of the states a judgment may be attacked upon motion to vacate it, for fraud in its procurement, though the application is made after the lapse of the term, and is based solely on extrinsic evidence: *McIntosh v. Commissioners*, 13 Kan. 171; *In re Fisher*, 15 Wis. 511; *Dial v. Farros*, 1 McMull. 292; 36 Am. Dec. 267; *Taylor v. Sindall*, 34 Md. 38; *Pyett v. Hatfield*, 15 La. 473; *Olmstead v. Olmstead*, 41 Minn. 297; *Allen v. McClellan*, 12 Pa. St. 323; 51 Am. Dec. 608; *Edson v. Edson*, 108 Mass. 500; 11 Am. Rep. 293. But we judge the safer practice is to require relief to be sought by a suit in equity: *Syme v. Trice*, 96 N. C. 243; *Sharp v. Danville, M. & S. W. R. R.*, 106 N. C. 306; 19 Am. St. Rep. 533. In chancery the power of the court to discharge the enrollment and open the decree never terminated, unless there had been a regular trial on the merits. A decree may, therefore, where the chancery practice prevails, be, in effect, attacked and set aside, by showing by any competent evidence that it was not based on a trial on the merits, that it is

inequitable, and that the party was prevented from having such trial by some cause ordinarily regarded as sufficient to warrant the interposition of equity; such, for instance, as fraud, accident, mistake, or surprise: *Cowley v. Leonard*, 28 N. J. Eq. 467; *Herbert v. Rowles*, 30 Md. 271; Freeman on Judgments, 4th ed., sec. 100; *Hargrave v. Hargrave*, 9 El. & B. 14; *Kemp v. Squires*, 1 Ves. Sr. 205. The rules applicable to motions to vacate judgments, in England and in Maryland and Michigan, seem to be as liberal as those of the courts of chancery in like proceedings against decrees: *Hall v. Holmes*, 30 Md. 558; *Lores v. Reeves*, 2 Mich. 133; *Hurlburt v. Reed*, 5 Mich. 30; *Cannan v. Reynolds*, 5 El. & B. 301; 1 Jur., N. S., 873; 26 L. J. Q. B. 62. See also Freeman on Judgments, sec. 101 b. An error of court, whether at law or in equity, either in reaching an incorrect conclusion from the evidence offered, or in admitting or rejecting such evidence, or any other error of law, cannot, after the lapse of the term, sustain a motion to vacate a judgment or decree procured after a hearing on the merits: *Charman v. Charman*, 16 Ves. 115; *Green v. Hamilton*, 16 Md. 317; 77 Am. Dec. 295; *McBride v. Wright*, 75 Wis. 306; *Brett v. Myers*, 65 Iowa, 274; *State v. Horton*, 89 N. C. 581.

Writs of error *coram nobis* and *coram vobis* were formerly employed for the purpose of obtaining relief from judgments. They were not, however, available to correct or set aside any action or decision of the court, unless it had been taken and made upon facts presumed by the court to exist, such presumption not being in harmony with the truth, as where a court acted upon the presumption that a party was living, and competent to appear as a litigant and to protect his interest, when in fact such party was dead, or was an infant, a lunatic, or a married woman: Freeman on Judgments, sec. 94. The grounds upon which either of these writs was sustainable were such as rarely or never appeared by the record, and hence they must have been supported by extrinsic evidence. As these writs are generally superseded by the remedy by motion to set aside a judgment, it has been held that whenever the moving party would have been entitled to relief by them at the common law he should now be conceded relief upon motion, and therefore that a judgment may be set aside on motion, on the ground that the person against whom it was pronounced was an infant, and that fact was unknown to the court: *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153; *Townsend v. Cox*, 45 Mo. 401; *Levy v. Williams*, 4 S. C. 515.

The proceeding by writ of *audita querela* may also be regarded as a direct attack on a judgment in all cases to which it can be properly applied. The original purpose of the writ, and the one to which it is generally confined, is that of relieving a party from a wrongful act of his adversary, and of permitting him to show any matter of discharge which may have occurred since the rendition of the judgment, or where a defense, though existing prior to the judgment, was not brought to the attention of the court on account of the fraud or collusion of the prevailing party: Freeman on Judgments, sec. 95. It is in the nature of a bill in equity, and relief cannot be obtained under it on account of errors of the court in matters of law or of fact, which might have been corrected by a writ of error in some appellate proceeding: *Lamson v. Bradley*, 42 Vt. 165; *Spear v. Flint*, 17 Vt. 497; nor on account of injuries suffered by the applicant from a judgment rendered against him through his own negligence: *Thatcher v. Gammon*, 12 Mass. 270; *Grubbold v. Rutland*, 23 Vt. 324; *Avery v. United States*, 12 Wall. 304; *Barker v. Walsh*, 14 Allen, 175; nor because his defense was equitable, and the court at law could not consider it: *Garfield v. University*, 10 Vt. 536. The attack by *audita querela* being direct, the party seeking relief may contradict the

record: *Folsom v. Conner*, 49 Vt. 4; *Paddleford v. Bancroft*, 22 Vt. 529; *Hill v. Warren*, 54 Vt. 73.

The proceeding by writ of *certiorari* is direct: *Linch v. Bread*, 70 Tex. 92. In some of the states, the writ, in the cases to which it is applicable, performs functions similar to those of a writ of error, and by it errors of law may be reviewed and set right, and the evidence may be examined for the purpose of ascertaining whether some finding of the court upon an essential fact was entirely unsupported by such evidence: *McAulley v. Horton*, 75 Ala. 491; *Central P. R. R. Co. v. Placer Co.*, 43 Cal. 365; *Jackson v. People*, 9 Mich. 111; 77 Am. Dec. 491; *Rayner v. State*, 52 Md. 368; *Lopen v. Commissioners*, 65 Me. 160; *State v. Davis*, 48 N. J. L. 112; *Ex parte Madison T. Co.*, 62 Ala. 93; *Rauson v. McElvaine*, 49 Mich. 194; *State v. Whitford*, 54 Wis. 150; *Gerdes v. Champion*, 108 Ill. 137; *People v. Smith*, 45 N. Y. 776; *People v. Betts*, 55 N. Y. 600; note to *Duggan v. McGruder*, 12 Am. Dec. 529-537; while in other states its only office is to compel an inferior judicial tribunal to certify its proceedings to some superior court for the inspection of the latter, which, after such inspection, is required to set the proceedings aside only in so far as they are found to be beyond the jurisdiction of the subordinate tribunal: *Territory v. Dunbar*, 1 Ariz. 510; *State v. Le Blanc*, 42 La. Ann. 1190; *State v. Judge*, 42 La. Ann. 1089; *State v. Chandler*, 43 La. Ann.; *Barber v. Harris*, 6 Mackey, 586; 16 Wash. Law Rep. 796; *Brown v. Robertson*, 123 Ill. 631; *Sayers v. Superior Court*, 84 Cal. 642; *Alexander v. Municipal Court*, 66 Cal. 387; *Gibson v. Superior Court*, 83 Cal. 643; 85 Cal. 216. Whether the proceeding by *certiorari* is regarded as one merely to set aside proceedings in excess of the jurisdiction of the inferior tribunal, or as including the power to review errors committed in the exercise of existing jurisdiction, the attack thereby made must be supported solely by the record which is brought before the superior court, and the parties cannot go beyond it to show either the existence of alleged errors, or that the judgment sought to be annulled is in excess of the jurisdiction of the court, or was entered in a case in which it had no jurisdiction whatever over the subject-matter or of the parties against whom the judgment was rendered: *Fore v. Fore*, 44 Ala. 478; *Alexander v. Archer*, 24 Pac. Rep. 373 (Nev.); *Miller v. McCullough*, 21 Ark. 426; *North v. Joslin*, 59 Mich. 624; *Galloway v. Corbitt*, 52 Mich. 460; *Tewksbury v. Commissioners*, 117 Mass. 563; *Barclay v. Brabston*, 49 N. J. L. 629; *Emery v. Brann*, 67 Me. 39; *Lee v. Drainage Commissioners*, 125 Ill. 47; *People v. Talmage*, 46 Hun, 606; *State v. Kernen*, 61 Wis. 494; *People v. Fire Commissioners*, 73 N. Y. 437; *Hannibal & St. J. R. R. Co. v. State Board*, 64 Mo. 296.

When a judgment of conviction and sentence is attacked by *habeas corpus*, the attack must be treated as collateral: *Turney v. Barr*, 75 Iowa, 758; *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; except when, as in the supreme court of the United States, the writ is issued in the exercise of appellate jurisdiction, and is accompanied by a writ of *certiorari* to bring up the records and proceedings of the inferior court; and even then the court disclaims the right to review mere errors or irregularities: *Ex parte Virginia*, 100 U. S. 341; *Ex parte Yerger*, 8 Wall. 385; *Ex parte Carl*, 106 U. S. 521; *Ex parte Curtis*, 106 U. S. 371. The writ of *habeas corpus* does not, ordinarily, lie to review errors of law or of fact, and a prisoner, when in custody under a commitment issued on a judgment of conviction and sentence, must be remanded, unless the judgment has been satisfied, set aside, or reversed, or is absolutely void: *Ex parte Marx*, 86 Va. 40; *Ex parte Rollins*, 80 Va. 214; *In re Coy*, 127 U. S. 757; *Ex parte Watkins*, 3 Pet. 202. It should not be

treated as void because the verdict on which it was based was defective: *Wills v. Bayles*, 105 Ind. 263; *Dover v. State*, 75 Ala. 46; or the court, after the defendant pleaded guilty, failed to call a jury to say, in their discretion, whether he should suffer the penalty of death or should be imprisoned for life: *Lowery v. Howard*, 103 Ind. 440; or the evidence was insufficient to warrant a conviction: *In re Bion*, 59 Conn. 372; *In re Wight*, 136 U. S. 143; *Turney v. Barry*, 75 Iowa, 758; *Stevens v. Fuller*, 134 U. S. 468; or the judgment, though against the defendant, was upon an obligation executed by another person having the same name: *German's Case*, 124 Mass. 199; or the prisoner did not commit the act for which he has been adjudged guilty of a contempt of court: *Ex parte Terry*, 123 U. S. 289; *State v. Woodfin*, 5 Ired. 199; 42 Am. Dec. 161; *Whittem v. State*, 36 Ind. 196; or his age was or was not such as to authorize his imprisonment in the place in which the judgment directs him to be confined: *Ex parte Williams*, 87 Cal. 78; *Ex parte Kaufman*, 73 Mo. 588; or, though the court had adjudged him able to comply with an order, and to be guilty of contempt in not complying with it, yet that he was not, in fact, able to yield such compliance: *In re Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266; *People v. Foster*, 104 Ill. 156. "As to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263. Any irregularity in the service of process, or in making the arrest, is immaterial: *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Kellogg*, 6 Vt. 511; *Owens v. Getcain*, 4 Dill. 438. 'After final judgment of conviction, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it, and this is true even though the prisoner had been kidnaped and forcibly brought before the court from a foreign jurisdiction': *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263; *People v. Rowe*, 4 Park. Or. 253; *United States v. Lawrence*, 13 Blatchf. 306; *State v. Ross*, 21 Iowa, 467; *Mahon v. Justice*, 127 U. S. 700. If it appears that the jurisdiction of the court depended upon a litigated fact which it adjudged to exist, this adjudication is conclusive upon *habeas corpus*, as well as in all other collateral proceedings": *Freeman on Judgments*, sec. 619; *Ex parte Starnes*, 77 Cal. 166; 11 Am. St. Rep. 251.

As a general rule, all errors and irregularities which might have been grounds of appeal, or of motions for new trials or to set aside the judgment or conviction, or in arrest of judgment, are not available on *habeas corpus* for the purpose of securing the prisoner's discharge: *Freeman on Judgments*, secs. 620, 621. There are, however, some matters which, though they might have sustained an appeal, are not waived by the failure to prosecute it, and which are available on *habeas corpus*. These matters generally, and perhaps universally, are apparent from an inspection of the record, in connection with the existing laws, and can hardly be regarded as constituting subjects of an attack upon the judgment, but rather as establishing that, conceding the defendant to have been guilty of the acts of which he has been convicted, yet that the law does not sanction his imprisonment therefor. While the sufficiency of an indictment will not be considered if it is apparent therefrom that the defendant has been convicted of some crime under an imperfect, informal, or defective accusation (*Matter of Eaton*, 27 Mich. 1; *Emanuel v. State*, 36 Miss. 627; *Parker v. State*, 5 Tex. App. 579; *Petition of Semler*, 41 Wis. 517; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 20; *McLaughlin v. Erickson*, 127 Ind. 474; 22 Am. St. Rep. 658; *Ex parte Fu Kl*,

79 Cal. 534), yet we think that if the act of which he is convicted is clearly not criminal, either because there is no law making it such, or because the enactment to make it criminal had been repealed or is unconstitutional and inoperative, he must be released: *In Matter of Corryell*, 22 Cal. 178; *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257; *Ex parte Kearney*, 55 Cal. 212; Freeman on Judgments, sec. 622, 624, 626; *Ex parte Grace*, 12 Iowa, 208; 79 Am. Dec. 529; *Ex parte Siebold*, 100 U. S. 376; *Herrick v. Smith*, 1 Gray, 49; 61 Am. Dec. 381. His release must also be ordered if he is shown to have been previously convicted of the same crime: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901; *Ex parte Rollins*, 80 Va. 314; *Brown v. Duffus*, 66 Iowa, 193; *Whitcomb's Case*, 120 Mass. 118; 21 Am. Rep. 502; *Bushel's Case*, 6 How. St. Tr. 999; *In re Snow*, 120 U. S. 274; *In re Nielsen*, 131 U. S. 176.

In criminal as in civil cases, a judgment is void if rendered by a court having no jurisdiction either of the subject-matter of the proceeding or of the person of the defendant, and if this want of jurisdiction appears, he must be released upon *habeas corpus*: Freeman on Judgments, sec. 623; *Cropper v. Commonwealth*, 2 Rob. (Va.) 842; *Ex parte Milligan*, 4 Wall. 2; *Ex parte Schultz*, 6 Whart. 269. It is essential that the court not only have jurisdiction of the crime, but that its jurisdiction be invoked in the manner sanctioned by law. Therefore, if the crime of which the defendant has been convicted is one for which he could be held to answer only upon the presentment or indictment of a grand jury, and he has not been indicted nor presented, his conviction is void: *Ex parte Yarborough*, 110 U. S. 651; *State v. West*, 42 Minn. 147. If the jurisdiction of the court is dependent upon the existence of some fact which it was the duty of the prosecution to prove at the trial, and the proof of which was necessary to sustain the verdict of guilty, such verdict and the judgment entered thereon are conclusive against the defendant, and he cannot relitigate the same issue on *habeas corpus*: *People v. Liscomb*, 60 N. Y. 571; 19 Am. Rep. 211; *Matter of Newton*, 16 Conn. B. 97; 24 L. J. Com. P. 148. It is not sufficient that a court have jurisdiction to try a cause and to enter judgment therein; it must also have had power to grant the relief or to impose the sentence contained in its judgment. Hence, if it appears that the court directed the defendant to do some act which it had no power to require of him, and then imprisoned him for contempt in not doing as directed (*Ex parte Gordon*, Sup. Ct. Cal., Dec., 1891; *Ex parte Fisk*, 113 U. S. 713; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Ayers*, 123 U. S. 443), or, after his conviction of some crime, sentenced him to suffer a punishment which it had no power to impose, the sentence, in so far as it is in excess of the jurisdiction of the court, is void, and will not justify the detention of the prisoner: *Ex parte Bond*, 9 S. C. 80; 30 Am. Rep. 20; *Ex parte Crandall*, 34 Wis. 177; *People v. Baker*, 89 N. Y. 460; *Ex parte Mooney*, 26 W. Va. 36; 53 Am. Rep. 59; *Rez v. Collyer*, Sayers, 44; *Ex parte Page*, 49 Mo. 291; *Ex parte Lange*, 18 Wall. 163; *People v. Liscomb*, 60 N. Y. 559; 19 Am. Rep. 211.

The national courts and judges may issue writs of *habeas corpus* for the release of prisoners in custody for acts done or omitted in pursuance of a law of the United States, or of an order, process, or decree of the court or judge thereof, or in custody in violation of the constitution, laws, or treaties of the United States, or for an act done or omitted by a subject or citizen of a foreign country, under a legal right, title, authority, privilege, protection, or exemption claimed under the commission, order, or sanction of such foreign state, or under the color thereof, the validity and effect of which depend upon the law of nations. It is perfectly obvious, therefore, that persons may



be discharged on *Antheas corpus*, though convicted after a regular prosecution or trial, if the act or omission upon which the conviction was had was one of the class specified above. Generally, the record of conviction would disclose the act or omission for which the sentence was imposed, and it would not be necessary for the court or judge issuing the writ of *habeas corpus* to look beyond such record for the purpose of determining whether the defendant should be released: Freeman on Judgments, sec. 626. Whether, however, it would be competent for the court to receive extrinsic evidence for the purpose of showing whether or not the act or omission of which the defendant was convicted was one entitling him to release is a question which, so far as we are aware, has not been judicially determined.

There are various other special proceedings in which judgments may be relied upon by one of the litigants, such, for instance, as *mandamus* and *quo warranto*, and in which the judgment so relied upon may be sought to be avoided. Neither of these proceedings is to annul, vacate, or modify a judgment, and upon principle, a judgment, when pleaded or offered in evidence therein, is entitled to the same immunity from collateral attack as if offered in any other collateral action or proceeding. In *mandamus* to compel the payment or to aid the enforcement of a judgment, if it appears from the record before the court that the judgment was recovered upon certain bonds and coupons which were void for want of authority to issue them, the writ will be denied in the national courts, on account of such invalidity, notwithstanding the judgment recovered upon them: *Brownsville v. Loague*, 129 U. S. 493. The general rule, however, is, that judgments have the same effect as *res judicata* in proceedings by *mandamus* as elsewhere: *Superior v. United States*, 4 Wall. 435; *Mayor v. Lord*, 9 Wall. 409; High on Extraordinary Legal Remedies, sec. 396.

It may be that a corporation, officer, or other person, natural or artificial, proceeded against by *quo warranto* pleads or proves in justification that the exercise of the office or franchise in question is sanctioned by the judgment or decision of some court, or of some person or tribunal exercising judicial functions, and the effect of this judgment or decision may be sought to be avoided either by showing that it was erroneous, or was made by a court or tribunal not possessed of jurisdiction to make it. We are aware of no decision upon this subject, but, upon principle, the judgment should be treated precisely as if it were offered or pleaded in any other proceeding as a cause of action or of defense. If the judgment or decision was pronounced by a tribunal of special or limited jurisdiction, its authority to act must be established by the person relying upon it, and when so established, its decision must be respected, whether erroneous or not. If, on the other hand, the judgment was rendered by a court of general jurisdiction, jurisdictional presumptions in its favor should be regarded as incontrovertible, to the same extent as they are in other collateral proceedings.

There is, however, a class of proceedings similar in effect to proceedings by *quo warranto*, but which are essentially different in their nature, and which may properly be regarded as direct. Thus if the existence of a corporation or the authority of a board or other tribunal depends upon some pre-existing jurisdictional fact which has been determined to exist by some court or other tribunal possessing authority to determine it, but the proceedings of such court or tribunal are required to be submitted to a superior court to be examined for the purpose of ascertaining whether they are valid, and of approving them if found to be so, the proceeding in the latter court is direct, and before its approval can be given, it must be shown that the jurisdictional fact

did in truth exist as was affirmed by the subordinate court or tribunal: *In the Matter of Madeira Irrigation District*, Cal. Sup. Ct., Dec. 12, 1891; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594. In cases of this class it is evident that the proceeding stands on substantially the same footing as if an appeal had been authorized to be taken to the superior court upon the question both of law and of fact, and the party interested had availed himself of the remedy thus afforded.

If a debtor has been granted a discharge from his debts or other obligations by a court of bankruptcy or insolvency, the effect of the judgment or order granting such discharge may be avoided by showing any of the grounds of avoidance specified in the statute authorizing the discharge and declaring its effect. In all other respects, it is as impregnable to collateral assault as any other judgment of a court of competent jurisdiction: *Freeman on Judgments*, secs. 337 a, 607. If the judgment was entered during the pendency of the bankruptcy proceeding, and before the discharge was granted, the bankrupt, upon obtaining the discharge, is entitled to have the court in which the judgment was rendered enter a perpetual stay of proceedings therein: *Boydston v. Bell*, 121 U. S. 457. If, however, he secures his discharge before the judgment is rendered against him, he must, whether the action is then pending or is subsequently commenced, avail himself of such discharge by some appropriate pleading, motion, or other proceeding, and if he fails to do so, or though he does so if the court refuses to give the proper effect to the discharge, any judgment subsequently recovered against him cannot be avoided collaterally by showing his previous discharge, and that such judgment, because of the discharge, ought not to have been rendered: *Rahn v. Missis*, 40 Cal. 421; *Marsh v. Mandeville*, 28 Miss. 122; *Dimock v. Recers O. Co.*, 117 U. S. 559; *Woodbury v. Perkins*, 5 Cush. 86; 51 Am. Dec. 51; *Bown v. Morange*, 108 Pa. St. 69.

The effect of a judgment or order of a court of bankruptcy may, like the judgment of any other court, be collaterally avoided by showing that it did not have jurisdiction of the subject-matter, or that the person against whom the judgment is sought to be used was not subject to the jurisdiction of the court. A discharge granted to a bankrupt or insolvent is operative in his favor against every person over whom the court had jurisdiction. Over the creditors resident in the state or nation wherein the discharge is granted, it has undoubted jurisdiction, and the discharge is valid and operative against them, both there and elsewhere, unless its effect is annulled or limited by some constitutional inhibition or restriction: *Baker v. Whenton*, 5 Mass. 509; 4 Am. Dec. 71, and note; *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342, and note; *Blanchard v. Russell*, 13 Mass. 1; 7 Am. Dec. 106, and note; *Pett v. Hibbard*, 26 Vt. 702; 62 Am. Dec. 606; and if both the creditor and debtor are residents of the state or nation, it is of no consequence that the contract was made and is to be performed elsewhere: *Marsh v. Putnam*, 3 Gray, 551. As against non-residents who have not appeared in the foreign court, nor in any way submitted either their claims or their persons to its jurisdiction, any discharge granted by it must generally be wholly ineffective in any other state or country: *Norton v. Cook*, 9 Conn. 314; 23 Am. Dec. 342; *Smith v. Buchanan*, 5 East, 6; *Munroe v. Guillaume*, 3 Keyes, 30; 3 Abb. App. 334; *Smith v. Smith*, 2 Johns. 235; 3 Am. Dec. 410, and note; *White v. Canfield*, 7 Johns. 117; 5 Am. Dec. 249; *Mitchell v. McMilkam*, 3 Mart. (La.) 676; 6 Am. Dec. 690; *Fanuxem v. Haslehurst*, 4 N. J. L. 192; 7 Am. Dec. 562. But it may be, and has been insisted, that the place where a contract was made or is to be performed is of controlling importance in determining what

courts have jurisdiction to discharge it, and that though the creditor is a resident of another state or nation, his residence does not carry with it the debt due him, so that the courts where it was created may not discharge the debtor from all obligation to pay it. We apprehend there is no doubt that the courts of a country where an obligation arose or was created may grant a discharge therefrom which is there operative, whether the creditor is resident or non-resident, because, unless restrained by some constitutional limitation, laws may be enacted in any country withdrawing all aid for the enforcement of obligations by legal proceedings, and there are numerous decisions to the effect that when a contract is discharged by proceedings in the country where it was created or made payable, and where the debtor resides, it must be regarded as discharged everywhere, though the creditor was a non-resident and did not appear in the foreign court: *May v. Breed*, 7 Cash. 15; 54 Am. Dec. 700; *Balkantine v. Golding*, 1 Cooke, 487; *Potter v. Brown*, 5 East, 124; *Vary v. McHenry*, 29 Me. 206; *In re Kinsley*, 1 Low. 221; *Long v. Hammond*, 40 Me. 204; *Gardiner v. Houghton*, 2 Best & S. 743. These decisions are, however, necessarily in conflict with the principles adopted and enforced by the supreme court of the United States, as well as by other courts, to the effect that a bankruptcy or insolvency statute can have no extraterritorial operation, and that a citizen of one state cannot be required to appear in the courts of another, and to submit to their exercise of jurisdiction over him, or to their discharge of an obligation due him, though it was created or is to be performed in the state where such courts have jurisdiction: *Baldwin v. Hale*, 1 Wall. 223; *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203; *Anderson v. Wheeler*, 25 Conn. 613; *Whitney v. Whiting*, 35 N. H. 487; *Murphy v. Manning*, 134 Mass. 488. It is true that these principles were, in the cases cited, applied only to discharges granted by the courts of one state, when sought to be asserted against the citizens of another; but it seems unreasonable to concede to the courts of foreign nations an authority over the citizens of a state which is denied to the courts of sister states.

It only remains for us to consider, as briefly as possible, the rules applicable to ordinary actions, the object of which is not to annul, vacate, or modify a judgment. We need not cite authorities to show that a judgment, whenever properly pleaded or offered in evidence in another action, cannot be avoided, as between the parties to it, for any mere error or irregularity of the court by which it was pronounced, and that whatever has been thereby decided and determined must be regarded as conclusively and irrevocably established, as between the parties thereto and persons in privity with them, until the judgment shall have been set aside, either upon appeal or upon some other appropriate proceeding directed against the judgment, for the purpose either of annulling, vacating, or modifying it. Therefore, in a collateral action, the force of a judgment can be destroyed only by showing that the court did not have jurisdiction over the subject-matter or the person against whom it was rendered, or, though having jurisdiction both of the subject-matter and of the person, did not have power to give the relief which it awarded.

If the judgment relied upon was pronounced by a court of limited jurisdiction, there is no presumption in favor of its authority to act, and such authority must, therefore, be shown by the party who relies upon it: *Freeman on Judgments*, sec. 517; *Tucker v. Harris*, 13 Ga. 1; 58 Am. Dec. 488; *People's Savings Bank v. Wilcox*, 15 R. L. 258; 2 Am. St. Rep. 894; *Lowry v. Brois*, 6 Rob. (La.) 192; 39 Am. Dec. 556; *Smith v. Finley*, 52 Ark. 373. The jurisdiction of the court would ordinarily affirmatively appear from its judg-

ment and the papers on file in the action. If it does not so appear, there is some doubt whether it may be shown by extrinsic evidence or not, the better opinion being, in our judgment, that unless the jurisdictional facts are by statute required to appear from the papers and files in the action, they may be established by competent extrinsic evidence: *Freeman on Judgments*, sec. 518; *Jolley v. Folke*, 34 Cal. 321; *Williams v. Commack*, 27 Miss. 209; 61 Am. Dec. 508; *Liss v. Wilcozen*, 2 Col. 85; *Van Duesen v. Sweet*, 51 N. Y. 385; *Behymer v. Nordloh*, 12 Col. 352. Though the jurisdiction of the court appears affirmatively from the papers and files, they are not entitled to the verity of records, and their assertions may be disproved by extrinsic evidence, and the judgment thereby be shown to be void: *Sanborn v. Fellows*, 22 N. H. 489; *Balladay v. Bainhill*, 29 Iowa, 555; *Sears v. Terry*, 26 Conn. 273; *Culver's Appeal*, 48 Conn. 165; *People's Savings Bank v. Wilcox*, 15 R. I. 258; 2 Am. St. Rep. 894. In some of the states this rule does not prevail where the evidence of the service of process consists of the return of an officer, and the party affected thereby has a remedy against him by an action for a false return: *Lightsey v. Harris*, 20 Ala. 409. Though the court is one of inferior jurisdiction, if it has authority to inquire concerning the existence of some jurisdictional fact and to determine whether it existed or not, its determination on this subject is as conclusive as upon any other, and cannot be assailed collaterally, and such determination need not appear in express terms, but will be implied, if the tribunal proceeded to take such action as could properly be taken only after it had made the requisite inquiry and found that the jurisdictional fact existed: *Freeman on Judgments*, sec. 523; *Blair v. Smith*, 5 Gray, 135; 66 Am. Dec. 359; *Spaulding v. Homestead Ass'n*, 87 Cal. 40; *Stoddard v. Johnson*, 75 Ind. 31; *Coloma v. Hayes*, 92 U. S. 434; *Commissioners v. Aspinwall*, 21 How. 539.

If the judgment is one pronounced by a court of record, its jurisdiction will be presumed, and if it is also a court of the state in which the judgment is offered in evidence, the presumption is, in most states, indisputable in a collateral action: *Freeman on Judgments*, sec. 130-132. It is, however, always essential that the court should have had jurisdiction over the subject-matter of the action or proceeding, and authority to award the relief granted: *Freeman on Judgments*, sec. 120, 120 c; and while, if such jurisdiction did not exist, its absence will generally appear from the record taken in connection with the existing laws, there is at least one instance in which it may be established by extrinsic evidence, to wit: it may be shown by such evidence that the person upon whose estate letters testamentary or of administration were granted was at the time still living, and that the court, therefore, had no jurisdiction over him and his estate: *Freeman on Judgments*, sec. 120; *Duncan v. Stewart*, 25 Ala. 408; 60 Am. Dec. 527; *Fisk v. Norvel*, 9 Tex. 13; 58 Am. Dec. 128; *Withers v. Patterson*, 27 Tex. 496; 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237; *contra*, *Roderigas v. East River S. I.*, 63 N. Y. 460; 20 Am. Rep. 555.

It is a condition precedent to the existence of jurisdiction over a person who does not voluntarily appear, that the court rendering the judgment against him have authority to require him to appear before it. Therefore, every personal judgment which a court may render against one who does not voluntarily submit to its authority, and who was not a citizen of the state, nor served with process within its borders, no matter what the mode of service was, is void: *Freeman on Judgments*, sec. 120 a. A person or corporation against whom a judgment is offered must, therefore, be permitted to show that he or it was not a citizen of the state when served with process,

and that such process was not served within the borders of the state: *Freeman on Judgments*, sec. 120 a, 120 b.

There is a class of persons who are in fact within a state, but, in contemplation of law, are not so within it as to be subject to the jurisdiction of its courts, because their presence is as the representatives of some other sovereignty, such as ambassadors and other public ministers and consuls and vice-consuls of foreign nations. Persons of this class, whether served with process or not, and whether they appear in court in response to such process or not, may, at any time, avoid a judgment against them, though entered after a trial upon the merits, by showing their official capacity: *Miller v. Van Loben Sels*, 66 Cal. 341; *Bore v. Preston*, 111 U. S. 256; *United States v. Benson*, 1 Bald. 234; *United States v. Lafontaine*, 4 Cranch C. C. 173.

While, as we have stated, persons not within the jurisdiction of a court cannot be required to appear before it and to submit to its exercise of authority over them, yet if they have property within the state, its courts have jurisdiction over such property, and may, by the service of process beyond the state, actual or constructive, obtain jurisdiction over non-residents to the extent of rendering judgments against them which may affect the title to their property within the state, as where the object of the action is to enforce a lien, make partition, set aside a transfer, determine conflicting claims of title, compel specific performance of contracts, condemn lands in the exercise of the power of eminent domain, or to enforce a pecuniary liability for the satisfaction of which property has been attached: *Freeman on Judgments*, sec. 120 a; *Arndt v. Griggs*, 134 U. S. 316; *Perkins v. Wakeham*, 86 Cal. 580; 21 Am. St. Rep. 67; *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Eastman v. Wadleigh*, 65 Me. 251; 20 Am. Rep. 695; *Loana v. Superior Court*, 85 Cal. 11; 20 Am. St. Rep. 197; *Young v. Upshur*, 42 La. Ann. 302; 21 Am. St. Rep. 281; *Venable v. Dutch*, 37 Kan. 515; 1 Am. St. Rep. 260.

There are, doubtless, judgments entered in cases over which the court had undoubted jurisdiction, which are wholly or partly void because the court either decided some question which it had no power to decide, or granted some relief which it had no power to grant; but it is very difficult to formulate any test by which to unerringly determine whether the action of the court in cases of this class is void or erroneous only. The fact that the court did something in excess of its jurisdiction, if it exists at all, must undoubtedly appear by the record, and such attack as is made must appear from and be established by the record taken in connection with the constitution and laws of the state. If a court should grant relief which under no circumstances it has authority to grant, its judgment is to that extent void; as where it orders a donation out of the public treasury: *Brilles v. Clay Co. Supervisors*, 57 Miss. 252; enters judgment for an amount greater than it is authorized to give: *Feil'ett v. Engler*, 8 Cal. 76; sentences a defendant to undergo a punishment different from or in excess of that which it is authorized to impose: *Ex parte Lange*, 18 Wall. 163; fines the prosecuting witness for costs, when there is no finding that the prosecution was instituted without probable cause and from malicious motives: *Little v. Evans*, 41 Kan. 578; annuls conveyances which are not the subject-matter of the action, nor sought to be annulled therein: *Munday v. Vail*, 34 N. J. L. 418; *Seamster v. Blackstock*, 83 Va. 232; 5 Am. St. Rep. 262; *Anthony v. Casey*, 83 Va. 338; 5 Am. St. Rep. 277; *Wade v. Hancock*, 76 Va. 620; directs the sale of property in a proceeding not instituted for the purpose of obtaining such sale, or enters personal judgment against the vendee of a mortgagor in a statutory

proceeding to foreclose a mortgage in which such judgment is entirely unauthorized: *Fiskian v. Monks*, 43 Mo. 502.

Though a court had jurisdiction both of the subject-matter and of the parties to the action, it may lose such jurisdiction at some subsequent stage of the proceeding, as where an appeal is prosecuted to some appellate tribunal: *McKinney v. Jones*, 57 Wis. 301; *Ex parte Sibbald v. United States*, 12 Pet. 433; *McClanahan's Heirs v. Henderson*, 1 T. B. Mon. 261; *McArthur v. Dane*, 61 Ala. 539; *Boynton v. Foster*, 7 Met. 415; or the cause is removed to the national courts by proper proceedings taken therefor: *Steamship Co. v. Tugman*, 106 U. S. 118; *Railroad Co. v. Koons*, 104 U. S. 14; or the term of the court has expired, and for that reason the authority to act is suspended until the commencement of the next term: *State Nat. Bank v. Neel*, 53 Ark. 110; 22 Am. St. Rep. 185; *Garlick v. Dunn*, 42 Ala. 404; *Kimports v. Rawson*, 29 W. Va. 487; *Brumley v. State*, 20 Ark. 77; *Galusha v. Butterfield*, 28 Conn. 227; *Ex parte Osborn*, 24 Ark. 479; *Hernandez v. James*, 23 La. Ann. 483; *Dodge v. Coffin*, 15 Kan. 277; *Dixon v. Judge Fifth Dist.*, 26 La. Ann. 119; *Baris v. Baris*, 27 Kan. 533; *Foley v. Oody*, 4 Col. 109; *Francis v. Wells*, 4 Col. 274; *Bruce v. Doodittle*, 81 Ill. 108; *Laughlin v. Peckham*, 66 Iowa, 121; *Marshall v. Ravitsie*, 22 Fla. 533; *Balm v. Nunn*, 63 Iowa, 541; *King v. Green*, 2 Stew. 133; 19 Am. Dec. 46; *Davis v. Fish*, 1 G. Green, 406; 43 Am. Dec. 337; *Wicks v. Ludwig*, 9 Cal. 175; *Norwood v. Kenfield*, 34 Cal. 333; *Doss v. Waggoner*, 3 Tex. 515; *Leclair v. Globenski*, 4 L. C. Rep. 139; or the jurisdiction of the court has been exhausted by the entry of a final judgment or order in the action or proceeding: *State v. Railroad Co.*, 16 Fla. 708; *Fossett v. McMahan*, 74 Tex. 546; or the court, when the party appeared before it, ordered his answer to be stricken out, and refused to hear him in his defense, in a case where it had no authority to strike out such answer and refuse such hearing: *Henry v. Carson*, 96 Ind. 412; *Windsor v. McVeigh*, 93 U. S. 274. If, in proceedings to settle the estate of a deceased person, an order is made appointing an executor or administrator, the court's jurisdiction to make such appointment is exhausted, and cannot again be exercised while the person so appointed continues in office, and any further grant of letters testamentary or of administration made by it is void: *Griffith v. Franzer*, 8 Cranch, 9; *Flinn v. Chase*, 4 Denio, 90. So if an estate is fully administered upon, and the property thereof distributed to the heirs: *Fisk v. Norvel*, 9 Tex. 13; 53 Am. Dec. 128; or if, in the due course of administration, the property of the decedent is sold and the title vested in the purchaser thereof, any further proceeding for the readministration or distribution of the property so distributed, or for the sale of the property so sold, whether taking place in the same or in another court, is without jurisdiction and void: *Lindsay v. Jaffray*, 55 Tex. 626; *Smith v. Woolfolk*, 115 U. S. 143.

A *scire facias* or an action at law upon a domestic judgment is a collateral proceeding so far as any attack upon the judgment is concerned. The effect of the judgment cannot be avoided for error or irregularity, nor can any defense be made which must involve a re-examination of the issues presented in the original action, and either determined by the court or confessed by the defendant, nor can any attack upon the jurisdiction of the court be entertained which would not be proper if it were attempted in any other action, if the judgment were offered therein as part of a chain of title or otherwise, *Freeman on Judgments*, sec. 435. If, however, the court in which the action is pending is competent to receive and act upon an equitable defense, such defense may be asserted by way of answer or cross-complaint, and relief given under the same circumstances as if such relief were sought in an independent

suit: *Dobson v. Pearce*, 12 N. Y. 153; 62 Am. Dec. 153; *Keele v. Elston*, 22 Neb. 310; *Dribard v. Ingram*, 21 Tex. 680; *Dunlap v. Cady*, 31 Iowa, 260; 7 Am. Rep. 129; *Duringer v. Meacham*, 93 Ind. 495. If the action is upon the judgment of a court of another state, or of a foreign nation, it cannot be resisted by showing mere errors or irregularities; but the jurisdiction of the court by which the judgment was pronounced is always open to question, and the defendant is at liberty to controvert jurisdictional statements and recitals, and to show by any competent evidence, extrinsic or otherwise, that the court was not entitled to exercise jurisdiction over him; *Freeman on Judgments*, sec. 562-564, 588-590.

A suit in equity to obtain relief from a judgment is a collateral attack within the definition given in the principal case, because it is not within the power of a court of equity to annul, vacate, or modify a judgment at law. The judgment complained of is permitted to stand, and the court of equity merely inquires whether there are any equitable circumstances requiring it to prevent the person in whose favor the judgment was recovered from enforcing or taking advantage of it; *Freeman on Judgments*, sec. 485. Among the grounds inducing a court of equity to act, error of a court at law in matters of law or of fact is not included; *Freeman on Judgments*, sec. 467. It must appear that the complainant could not present his cause of action or of defense to the court of law, either because it was incompetent to hear it and to grant relief therein, or because he was prevented from presenting it and from having it properly considered, through fraud, accident, mistake, surprise, or some other sufficient cause for the interposition of a court of equity; *Freeman on Judgments*, sec. 486. He may, if he can, show the existence of any of these causes, and that it operated to his prejudice, though his evidence tends to contradict the record. He may, therefore, prove that process was not served upon him, though the record declares that it was served; *Freeman on Judgments*, sec. 495; *Wilson v. Hawthorne*, 14 Cal. 520; 20 Am. St. Rep. 290; *Armsworth v. Cheek*, 2 Dev. Eq. 234; 34 Am. Dec. 273; *Croft v. Dexter*, 8 Ala. 767; 42 Am. Dec. 666; *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216; *Bridgeport S. B. v. Eldredge*, 28 Conn. 556; 73 Am. Dec. 688; *Johnson v. Coleman*, 23 Wis. 452; 99 Am. Dec. 193; *Lapham v. Campbell*, 61 Cal. 296. If the evidence of the service of process is contained in the return of a sheriff or other officer whose duty it was to serve such process and make return thereof, some of the courts deny relief, unless it appears that the false return was induced by the plaintiff in the action: *Walker v. Robbins*, 14 How. 584; *Knox Co. v. Harshman*, 133 U. S. 152; *Johnson v. Jones*, 2 Neb. 133; *Krug v. Davis*, 85 Ind. 309; *Taylor v. Lewis*, 2 L. J. Marsh. 400; 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 358, while other courts grant relief whether the plaintiff was instrumental in procuring the false return or not: *Ridgeway v. Bank of Tenn.*, 11 Humph. 523; *Ryan v. Boyd*, 23 Ark. 778; *Dunklin v. Wilson*, 64 Ala. 162; *Haunsworth v. Sullivan*, 6 Mont. 203.

Where the appearance of the defendant was entered in an action by an attorney, it was formerly thought that such appearance was binding on him, and that, except in an action against the attorney, the defendant would not be permitted to show that the appearance was not authorized, unless, perhaps, where the attorney was irresponsible or the appearance was entered through the procurement of the plaintiff. *Freeman on Judgments*, sec. 490. But the rule now generally prevailing is, that a judgment resting upon the unauthorized appearance of an attorney will not be allowed to be enforced, irrespective of the question whether the attorney is responsible or irresponsi-

ble: *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Gifford v. Thora*, 9 N. J. Eq. 702; *Marvel v. Manowrier*, 14 La. Ann. 3; 74 Am. Dec. 424; *De Louis v. Meek*, 2 G. Greene, 55; 50 Am. Dec. 491; *Jones v. Williamson*, 5 Cold. 370; *Boro v. Harria*, 13 Lea, 36; *Newcomb v. Dewey*, 27 Iowa, 381.

Where the relief sought in equity must, if granted, affect rights acquired by strangers to the judgment who are purchasers for value in good faith, and without there being anything in the record, or elsewhere, to give them any notice of any vice or other infirmity in the proceedings, it is manifest that their equities are, at least, equal to those of the complainant, and that relief cannot be granted against them without violating the legal maxim, that where the equities are equal, the legal title must prevail: *Freeman on Judgments*, sec. 510. We think no court will hesitate to apply this maxim, unless in cases where there was no service of process, and the court of law therefore did not have jurisdiction over the defendant, and had no notice of the action, and has been guilty of no laches. In the latter class of cases some of the courts have denied relief: *Reese v. Kennedy*, 43 Cal. 649; *Stokes v. Geddes*, 46 Cal. 17; while others have granted it: *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; and the rule upon the subject cannot be regarded as settled by any decided preponderance of authority.

If a party to a judgment which is not void does not procure its vacation by some motion, or prosecute some appellate proceeding, or seek relief in equity, he cannot avoid it when offered in evidence against him by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury, or collusion, or through some agreement entered into by the prevailing party which he had neglected or refused to perform: *Freeman on Judgments*, sec. 334. The judgment is, however, ordinarily obligatory only upon the parties thereto, and persons in privity with them. It may be that at the time the judgment is entered there are persons neither parties nor privies thereto, but whose interests may be injuriously affected if it is enforced as against them. Not being parties to the action, they are, in most instances, not entitled to move to vacate the judgment, nor to prosecute an appeal therefrom, nor to institute and maintain proceedings in equity to enjoin its enforcement. Their position would be sad, if they were not, therefore, permitted to a certain extent to impeach the judgment collaterally, when it is offered in evidence against them, or for the purpose of affecting their rights and interests. They are permitted to attack the judgment on the ground that they are creditors of the defendant, and that the judgment was suffered for the purpose of hindering, delaying, and defrauding them: *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Freeman on Executions*, sec. 136. Whenever a judgment or decree is procured through the fraud of either of the parties or by the collusion of both, for the purpose of defrauding a third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained: *Freeman on Judgments*, sec. 336; *Atkins v. Allen*, 12 Vt. 619; 36 Am. Dec. 361; *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527; *Downs v. Fuller*, 2 Met. 135; 35 Am. Dec. 393; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Robinson v. Davis*, 11 N. J. Eq. 302; 69 Am. Dec. 591; *Bunn v. Ahl*, 29 Pa. St. 387; 72 Am. Dec. 639; *Morrill v. Morrill*, 20 Or. 96; *ante*, p. 95. A stranger to a judgment, prejudiced by it when entered, may not avoid it collaterally for mere error or irregularity, though he may doubtless show by extrinsic evidence that the court did not have jurisdiction to enter it, and may further show that it



is erroneous, and also collusive, and if not collusive, that the nominal defendant made no defense therein, because he had no interest to be protected; but when a real defense is made in good faith, we think a stranger affected by the judgment will not be permitted to impeach it by retrying the case before another court, for the purpose of convincing it that a different judgment ought to have been entered in the former action: *Freeman on Judgments*, sec. 337.

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## STATE v. WHEELER.

[20 OREGON, 192.]

**CRIMINAL LAW—FORGERY OF NOTE.**—One who signs a promissory note under a false, fictitious, or assumed name, with intent to defraud another, is guilty of forgery.

**CRIMINAL LAW—FORGERY—INTENT.**—The essential element of forgery consists in the intent, when making the signature or procuring it to be made, even though the name affixed is that actually borne by the person affixing it, to pass it fraudulently as the signature of another than the one who actually makes it.

*Lydell Baker*, for the appellant.

*T. A. Stevens*, district attorney, and *W. T. Hume*, for the respondent.

**BEAN, J.** The defendant was indicted, tried, and convicted of the crime of forgery, from which judgment he appeals. The indictment charges that on June 28, 1890, the defendant made and forged a promissory note for \$85.50, payable to John P. Fidock or order, due thirty days after date, by then and there signing the name of John Williams to said note, with an intent to defraud and injure J. T. Milner.

At the trial in the court below, after the evidence for the state was closed, defendant's counsel moved the court that the jury be instructed to render a verdict of not guilty, upon the ground that the evidence failed to prove the crime charged. The refusal of the court to give this instruction is the only error claimed on this appeal. An examination of this question renders it necessary to briefly state the evidence as given on the trial, which was as follows: On June 28, 1890, the defendant called at the office of J. T. Milner, in Mulkey's block, in the city of Portland, and represented to Mr. Milner that his name was John Williams, and applied for a loan of \$85.50, offering to secure the same by a chattel mortgage on a team of horses. He drove the team up in front of the office, and Mr. Milner looked at them and agreed to make the loan. The note was drawn up by Milner, and the defendant signed

the name of John Williams thereto, and Milner paid him the money. When the note became due, the defendant did not call to pay it, and Milner wrote two letters to John Williams, calling on him to pay the note, one of which he directed to Albina. A Mr. John Williams, of Albina, responded to the letter sent him, but denied ever signing the note. That no part of the note has been paid, nor has defendant ever called at Milner's office, where the note was to be paid; that defendant was a stranger to Milner, and he supposed his true name was John Williams, and would not have made the loan had he known otherwise; that defendant's true name is Ed. Wheeler, as stated in the indictment, and not John Williams. The inquiry here is, whether, under this state of facts, the defendant was properly convicted of the crime of forgery. Forgery is defined by Blackstone to be "the fraudulent making or alteration of a writing to the prejudice of another's rights": 4 Bla. Com. 247. Willes, J., in *Regina v. Epps*, 4 Post. & F. 81, says: "Forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document really in existence as it appears on the face of it, when in fact there is no such genuine document really in existence as it appears on the face of it to be." In *State v. Wooderd*, 20 Iowa, 541, Dillon, J., says: "The making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery." Mr. Bishop says: "Forgery is the false making, or materially altering with intent to defraud, of any writing which if genuine might apparently be of legal efficacy, or the foundation of a legal liability": 2 Bishop's Crim. Law, sec. 523. Section 1808, Hill's Code, provides that "if any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit . . . any bill of exchange, promissory note, or evidence of debt, . . . shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years."

From the definitions of forgery, as above stated, as well as from the statute, it will be seen that the essential elements of the crime are: 1. A false making of some instrument in writing; 2. A fraudulent intent; 3. An instrument apparently capable of effecting a fraud. That the first and third ingredients above stated appear in this case cannot be doubted. The note executed by defendant under the name of John Williams is certainly a false note. It is not what it purports on its face to be,—is false, not genuine; fictitious, not a true writing.

The falsity of the note consists in its purporting to be the note of some party other than the one actually making the signature. It purports to be the note of one John Williams, while the signature was made by the defendant, and although the defendant represented that his name was John Williams, if he assumed that name for the purpose of defrauding, and under such a name executed the promissory note in this case, with an intent to defraud Milner, such an act would constitute forgery: 2 Bishop's Crim. Law, sec. 583. The law is well settled that the signing of a fictitious name to an instrument, with a fraudulent intent, constitutes forgery: 8 Am. & Eng. Ency. of Law, 457, and note; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *State v. Hahn*, 38 La. Ann. 169; *Luttrell v. State*, 85 Tenn. 232; 4 Am. St. Rep. 760; 2 Wharton's Crim. Law, sec. 1424; 2 Russell on Crimes, 733. As was said in *Commonwealth v. Costello*, 120 Mass. 370, "the essential element of forgery consists in the intent, when making the signature, or procuring it to be made, to pass it off fraudulently as the signature of another party than the one who actually makes it." If this intent thus to personate another exists, the instrument is still a forgery, even if the name affixed is actually the same name with that borne by the party who signs it. So there may be forgery by the use of a fictitious name as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name.

In *Sheppard's Case*, 1 Leach, 226, the prisoner purchased some silverware of the prosecutor, giving in payment therefor a draft, which he indorsed with the name "H. Turner, Esq.," his true name being Sheppard. The prosecutor testified that he gave credit to the prisoner, and not to the draft, the prisoner being a stranger to him. The jury found the prisoner guilty, and on a case reserved on the question whether, as the prosecutor had sworn that he gave credit to the prisoner and not to the draft, it could amount to the crime of forgery, the twelve judges were unanimously of the opinion that the conviction was right; for it was a false instrument, not drawn by any such person as it purported to be, and the using of the fictitious name was only for the purpose of deceiving. So in *Whiley's case*, stated by Mr. Russell in his work on crimes, the prisoner was charged with forging a bill of exchange, drawn in the name of Samuel Milward, in payment for some goods by him purchased of the prosecutor. The prisoner's real name was Samuel Whiley, and

was a stranger to the prosecutor, who testified that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; but that if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods, and have taken the draft from him and paid him the balance, as he had done when he came under the name of Milward. It was left to the jury to say whether the prisoner had assumed the name Milward in the purchase of the goods and giving the draft with intent to defraud the prosecutor. And the jury, saying they were so satisfied, found the prisoner guilty; and upon a case reserved, the judges were of the opinion that the question of fraud being so left to the jury, and found by them, the conviction was right. So where the person accepting the instrument knew the prisoner only by his assumed name, it appearing that it was assumed for the purpose of fraud: *Rex v. Francis*, Russ. & R. C. C. 209. So where the prisoner was unknown to the person on whom the instrument was passed, who had never heard of the name assumed, and would have trusted the prisoner just as readily by his real name: *Rex v. Marshall*, Russ. & R. C. C. 75.

The authorities agree that forging in a false name, assumed for the purpose of concealment and with an intent to defraud, in the particular instance of the forgery, is sufficient to constitute the offense. But when a party signs a name not his own, but one which he has adopted, using it without the intent to deceive as to the identity of the person signing, it is not a forgery: *Rex v. Bontein*, Russ. & R. C. C. 260; *Rex v. Peacock*, Russ. & R. C. C. 278. The question of intent is material in determining the guilt of the party charged and the falsity of the instrument. It is the false making with an intent to defraud at which our statute is aimed. The term "falsely," as applied to making a promissory note in order to constitute forgery, has reference, not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other; but it implies that the writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine, a counterfeit, and not the true instrument which it purports to be: *State v. Young*, 46 N. H. 266; 88 Am. Dec. 212. A per-

son may falsely make a note, yet the note be true in point of fact, or he may make a note which is false in fact. It is the former,—the falsely making of the note,—with the intent to defraud, which is the essential ingredient of the crime here charged. The falsely making of a note in the name of a person, as already shown, is forgery; so is the falsely making of a note under an assumed name. The defendant in this case made the note and signed a fictitious or an assumed name. He therefore falsely made it, although the fact stated in the note may be true. But the false making, when it was passed to Milner as genuine, indicated an intent to defraud, and brought the offense within the statute. This must logically be so, unless there is something in the facts and circumstances which contradict the intent to injure or defraud. In the case of *Queen v. Martin*, 29 Eng. Rep. 154, relied on by defendant, the facts show that the prisoner, in drawing the check, did not do so in the name of or as representing any other person, real or fictitious. The check was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. Here, while the prisoner falsely made the check, the circumstances show that it was not falsely made to defraud. The prosecutor relied upon and gave the credit to the prisoner, whom he well knew. But when the defendant is an entire stranger to the party to whom the note is passed, as in the case at bar, the credit is the note; for where is there any other element of credit which the party could be supposed to rely upon? Mr. Milner, in dealing with this defendant and making the loan to him, relied upon the genuineness of the note as one step in the transaction; and a fair and legal inference from all the testimony is, that defendant made the note with an intent to defraud, and thereby committed the crime of forgery.

It follows, therefore, that the judgment of the court below must be affirmed.

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**FORGERY, WHAT IS.** — It is forgery to sign a fictitious name to an instrument with intent to defraud: Note to *Arnold v. Coet*, 22 Am. Dec. 308, 309. The essential element of the crime is a fraudulent intent: Note to *Arnold v. Coet*, 22 Am. Dec. 313, 314; *People v. Dane*, 79 Mich. 361; *McConnell v. Kennedy*, 29 S. C. 180; *Gibson v. State*, 79 Ga. 344; *Commonwealth v. Brown*, 147 Mass. 585; 9 Am. St. Rep. 736; *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53; and proofs of such fraud are governed by the same rules as proofs

of fraud in civil cases: *People v. Kemp*, 76 Mich. 411. If there are two persons of the same name, and one of them signs that name to a note with the intent that the note may be used as the note of the other, the act is forgery: *Baryfield v. State*, 29 Ga. 127; 74 Am. Dec. 49; note to *Arnold v. Cost*, 22 Am. Dec. 383.

## FLINT v. PHIPPS.

[20 OREGON, 340.]

**EXECUTIONS — GROUNDS FOR QUASHING.** — When the execution under which a sale is made is defective in failing to follow the judgment in every essential particular except the names of the parties, and the fact appears, unexplained, that the amount realized at such sale was only about one half of what the property brought at execution sale a few months previously, the execution will be quashed, and the sale set aside. It is beyond the discretion of the trial court in such case to amend the execution and confirm the sale.

**APPEAL** from an order confirming a sheriff's sale made upon a decree of foreclosure, and also from an order allowing the execution upon which sale was made to be amended. Plaintiff recovered a final decree of foreclosure of a mortgage against the defendant, and execution was afterwards regularly issued, the property sold thereunder, and the sale confirmed. The decree was for \$13,045, which, together with other expenses, made the amount due \$14,974.70. The property sold for \$12,956.93, leaving a balance due on the mortgage of \$2,017.77. At such sale the piece of property which occasions this dispute was sold for five thousand dollars, and thereafter redeemed by Phipps. Flint subsequently took out another execution under the same decree under which said property was sold, for \$2,390, to satisfy the amount remaining due under the decree. The defendants thereupon filed objections to the confirmation of such sale, also to a motion to amend the execution and the return thereon, and also filed a motion to quash such execution. The court refused to grant the motion to quash the execution, and ordered it amended and the sale thereunder to be confirmed, and the defendants appealed.

*W. R. Willis*, for the appellants.

*J. C. Fullerton*, and *Hamilton and Hamilton*, for the respondent.

**STRAHAN, C. J.** The first question presented by the record is the sufficiency of the execution upon which the sale was made. It appears that there had been a previous sale of all

the lands described in the decree, and that the tracts of land described in this writ had been redeemed by the judgment debtor; but the writ fails to follow the decree in every essential particular except the names of the parties. The power of amendment is conceded, and in most cases should be exercised to support a title acquired at such sale; but it is still a power which must be exercised cautiously and in view of the facts of the particular case. A few months previously this land sold for five thousand dollars; at the sale in question it only brought about two thousand three hundred dollars. What caused this discrepancy does not appear. It cannot be claimed that so short a time had produced any effect upon the value of the property.

Courts always exercise full control over their process so that suitors shall not be prejudiced either by the form of the writ or the manner of its execution: *McKee v. Logan*, 82 Mo. 524. The defects in this writ may have been the reason why the property did not sell for as much as at the previous sale, and if so, then the parties were injured to the amount of the difference between the present and former sale. Under this view of the subject, we think the better practice would have been for the court below to have quashed the writ on the defendant's motion rather than to have amended it. This power of amendment is a very salutary one, but it ought always to be exercised in furtherance of justice. In this cause we have concluded to reverse the decree appealed from, and to quash the writ.

The other question raised is not fully presented by this record. It was said at the argument that the defendant Willis had purchased Phippe's interest in this land before the decree of foreclosure, and taken a deed therefor; but the fact does not appear in the record. If it did, what effect the fact would have upon the rights of these parties is not so manifest: *Boyce v. Wright*, 2 Abb. N. C. 163; *Bowers v. Arnoux*, 83 Sup. Ct. N. Y. 530; *Teabout v. Jaffray*, 74 Iowa, 28; 7 Am. St. Rep. 466; *Hervey v. Krost*, 116 Ind. 268; *Clayton v. Ellis*, 50 Iowa, 590. But whatever the correct rule may be, we do not care to enter upon its consideration until all the facts are before us.

Let the decree appealed from be reversed.

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**RECOMMENDATION — GROUNDS FOR QUASHING.** — Executions are under the control of the court, and if improvidently issued, should be quashed: *Harrington v. O'Reilly*, 9 Smedes & M. 216; 48 Am. Dec. 704.

## OAKES v. NORTHERN PACIFIC RAILROAD COMPANY.

[20 OREGON, 392.]

**CARRIER OF PASSENGERS — OBLIGATION TO CARRY, AND LIABILITY FOR LOSS OF BAGGAGE.** — A carrier of passengers undertakes, in carrying a passenger, not only to transport him, but to also carry a reasonable amount of his personal baggage as an incident to the principal contract, without any specific agreement or separate compensation; and as to such baggage he is under the same liability as insurer as a common carrier of goods or freight.

**CARRIER OF PASSENGERS — BAGGAGE, WHAT IS.** — The personal baggage of a passenger which the carrier undertakes to transport under his contract to carry, and without extra charge, consists of such articles as the necessity, convenience, comfort, or recreation of the passenger may require him to take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey; but it does not include that which is carried for the purpose of business, such as merchandise or the like.

**CARRIER OF PASSENGERS — BAGGAGE, WHAT DOES NOT CONSTITUTE.** — Stage properties, costumes, paraphernalia, and advertising matter of a comedy company are not personal baggage, nor included as such in the terms of a contract to carry a passenger, nor is the carrier liable for their loss or destruction, in the absence of negligence, unless he has accepted them as such baggage.

**CARRIER OF PASSENGERS — BAGGAGE — LIABILITY FOR.** — While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or destruction, though without fault.

*Dolph, Bellinger, Mallory, and Simon*, for the appellant.

*Jones and Stuart*, for the respondent.

**LORD, J.** The defendant does not deny liability for the loss or destruction of the personal baggage of the plaintiff and of the members of his troupe, but it denies liability for property other than actual personal baggage.

In determining the question presented by this record, it is necessary to understand the nature and extent of the obligation which a carrier of passengers by rail assumes as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. "The carriage of the baggage of the passenger," said Andrews, J., "under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger, and the duty arises on the part of the company to carry the baggage of the passenger as incident to the principal contract, without any specific agree-



ment or separate compensation": *Isaacson v. New York etc. R. R. Co.*, 94 N. Y. 278; 46 Am. Rep. 142. As respects such baggage, a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But it is only to such articles as may be legally termed baggage that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes baggage in the legal sense, or ordinary baggage, or personal baggage, as commonly used in England, it has been found by the courts difficult if not impossible to define with accuracy within the meaning of the rule of the carrier's liability.

"It is agreed on all hands," said Erle, C. J., "that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary luggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance": *Phelps v. London & N. W. R'y Co.*, 19 Com. B., N. S., 321. In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong. In *Weeks v. New York etc. R. R. Co.*, 9 Hun, 669, it is said that a passenger may carry with him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and convenience, or protection." In *Jordan v. Fall River R. R. Co.*, 5 Cush. 69, 51 Am. Dec. 44, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons traveling to take with them." In *Johnson v. Stone*, 11 Humph. 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes, and resources of the passenger." In *Hannibal R. R. Co. v. Swift*, 12 Wall. 262, Mr. Justice Field said that the contract to "carry the person only implies

an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations."

In *Macrow v. Great Western R'y Co.*, L. R. 6 Q. B. 612, Cockburn, C. J., said: "Whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only articles of apparel, whether for use or ornament, . . . but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage,' being thus confined to that which is personal to the passenger and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." See also 1 Am. & Eng. Ency. of Law, tit. Baggage, 1042; 2 Rorer on Railroads, 988; Hutchinson on Carriers, secs. 674, 685, 686. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as the necessity, convenience, comfort, or recreation of the passenger may require him to take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey.

The question what articles of property, as to quantity and value, contained in a trunk may be deemed baggage within the rule is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse: *New York etc. Co. v. Fraloff*, 100 U. S. 24; *Romar v. Maxwell*, 9 Humph. 622; *Brock v. Gale*, 14 Fla. 523; 14 Am. Rep. 356; *Mauritz v. N. Y. R. Co.*, 21 Am. & Eng. R. R. Cas. 286. As the contract of the carrier of passengers is to carry a reasonable amount of baggage for the accommo-

dation of the passenger, "it follows from the nature and object of the contract," as observed by Appleton, C. J., "that the right of the passenger is limited to the baggage required for his pleasure, convenience, and necessity during the journey": *Wilson v. Grand Trunk R. R. Co.*, 56 Me. 62; 96 Am. Dec. 425.

Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the terms of such contract, nor is the carrier liable for their loss or destruction in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of baggage, and in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier, and so the special verdict of the jury found. They segregated the articles which might properly be termed baggage from those carried for the purposes of business, and found separately the value of each, but by their general verdict found the company liable for the full value of the property, upon the assumption that the trunks and their contents were received by the company as baggage.

The bill of exceptions discloses that the court charged the jury, among other things, as follows: "There is another phase of this question. If you find, from all the evidence in the case, that these trunks were brought to the agent of the company, and their appearance indicated that they might not only contain the personal baggage, in the strict sense of the word, of the party, but that other things than baggage were received without objection, and no fraud or concealment was practiced by the plaintiff; if the trunks, on their face, advertised fully what their contents were, and their agents received them under these circumstances, and gave checks for them, and the company, through these agents and employees, took them into its charge without making any objection, — then the defendant is to be deemed to have taken these articles as baggage," etc. In substance, the complaint alleges that the defendant was fully informed of the contents of the trunks prior to their delivery, and that the defendant received and checked them as baggage, which is put in issue by the denials of the answer.

Although the bill of exceptions contains no evidence, nor is any certified to us by this record, the issue permitted, and the instruction was designed to meet, the evidence upon this phase of the case. Under such circumstances, we are bound to assume that there was evidence tending to show that the defendant had notice of the nature of the property, and received it as baggage for transportation.

In this view, the general verdict is not inconsistent with the special findings; for if the defendant knowingly permitted the plaintiff to take as baggage articles that would not come under that description, it is liable for their loss, though not arising from its negligence. While it is true that passenger carriers are not liable for merchandise and the like when packed up with a traveler's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss: Story on Bailments, sec. 499. Thus in the case of *Great Northern R'y Co. v. Shepherd*, 8 Ex. 30, Parke, B., said: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So, also, upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable." And in *Macrow v. Great Western R'y Co.*, L. R. 6 Q. B. 612, Cockburn, C. J., said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence."

In *Sloman v. Great W. R'y Co.*, 6 Hun, 546, Gilbert, J., after stating and citing authorities to sustain the proposition that railroad companies are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable if they knowingly undertake to transport merchandise in trunks or boxes which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has

notice of such regulation"; citing *Butler v. Hudson River R. R. Co.*, 3 E. D. Smith, 571, and other cases. See also 2 Wait's *Actions and Defenses*, 82. "Doubtless," said Mitchell, J., "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable": *Haines v. Chicago etc. R'y Co.*, 29 Minn. 161; 43 Am. Rep. 199. So in *Texas etc. R'y Co. v. Capps*, 16 Am. & Eng. R. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage: *Chicago etc. R. R. Co. v. Conklin*, 16 Am. & Eng. R. R. Cas. 116; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Dec. 288. Again, in *Hoeger v. Chicago M. etc. R'y Co.*, 63 Wis. 100, 53 Am. Rep. 271, a traveling agent applied to a railroad company to transport his sample trunks as baggage, and the company, knowing their contents, received and checked them as baggage, and carried them as such on the passenger train on which he rode, and the court held that both parties were estopped to claim that such trunks were not baggage, and to be treated as such, and not as ordinary freight. So that while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault. Now, the issue invites and the instruction indicates that there was evidence tending to prove that the contents of the trunks were fully advertised, and that the agent of the defendant knew that they contained, besides personal apparel, stage costumes and properties, and that they were received and checked as baggage, and in such case the defendant is liable for loss, though without fault, as the jury have found by their verdict, and the court affirmed by its judgment.

In this view, there is no inconsistency in the general verdict with the special findings, and the judgment must be affirmed.

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**CARRIERS OF PASSENGERS—OBLIGATION TO CARRY AND LIABILITY FOR LOSS OF BAGGAGE.**—Carriers of passengers are liable for any losses occurring through accident to their baggage: *Roth v. Buffalo etc. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 734, and note. Passenger carriers are liable for baggage of passengers as common carriers: *Dibble v. Brown*, 12 Ga. 217; 56 Am.

Dec. 460, and note; *Shaw v. Northern P. R. R. Co.*, 40 Minn. 144; *Staub v. Kendrick*, 121 Ind. 226; *Peterson v. Chicago etc. R'y Co.*, 80 Iowa, 92; *Coakley v. Nagle*, 83 Ga. 697; *Georgia etc. R. R. Co. v. Thompson*, 86 Ga. 327.

**CARRIERS OF PASSENGERS — BAGGAGE, WHAT IS AND WHAT IS NOT.** — A contract to carry the baggage of a passenger includes only such articles as are carried by him for his personal use and convenience, according to the wants and habits of persons of his class, either with reference to his immediate wants or the ultimate object of the journey: *Mets v. California etc. R. R. Co.*, 85 Cal. 329; 20 Am. St. Rep. 228, and note. Merchandise is not baggage: *Norfolk etc. R. R. Co. v. Irvine*, 85 Va. 217; *Hamburg etc. Packet Co. v. Gattman*, 127 Ill. 598. Money is not baggage: *Ellis v. Chicago etc. R'y Co.*, 72 Iowa, 228.

## STOTT v. FRANEY.

[20 OREGON, 410.]

### ASSIGNMENT OF MONIES TO BECOME DUE — ENFORCEMENT OF, IN EQUITY. —

An assignment by a city contractor of his right to receive warrants subsequently to become due for work done on the streets vests an equitable interest therein in the assignee, which will be enforced in equity by directing the delivery of such warrants to him when they are issued.

**ASSIGNMENT OF MONIES TO BECOME DUE FROM CITY — OFFICER MAY BECOME ASSIGNEE.** — The president of a city council may become the assignee of warrants to be subsequently issued and paid by the city for work already done on its streets, even though the statute provides that "no member of the common council shall be interested in any contractor's job the expenses of which are paid out of the city treasury."

**ASSIGNMENT OF MONIES TO BECOME DUE — RIGHTS OF ASSIGNEE.** — Where one of two joint contractors assigns his portion of warrants to become due for work done by them, the portion assigned will not be taken from the assignee, and turned over to the other joint contractor; to indemnify him against a possible claim of a creditor of the assignor who may seek to hold the contractors as partners.

**ACTION by Stott, as assignee, to recover on certain city warrants.** The defendant Franey and one Woods jointly contracted with a city to do certain grading, and to construct certain cross and side walks on certain streets. They agreed to do certain specified portions of such work without sharing profits and losses. Woods completed his part of the work, and assigned to plaintiff all warrants to be issued by the city to Franey and Woods for laying cross and side walks on certain blocks therein. At the time the warrants were issued by the city, and at the request of Franey and Woods, the warrants were issued separately for the grading and for the cross and side walks. The warrants issued for the former work were delivered to Franey as his compensation therefor, while the warrants for the latter work, being the ones now in dis-

dispute, were intended for Woods, as his compensation for his part of the work. It was also sought in this suit to enjoin an action at law, commenced by Franey in the name of Woods and Franey, to recover the warrants in dispute. Judgment for plaintiff, and defendant Franey appealed.

*R. Citron and James Gleason*, for the appellants.

*John H. Hall and W. E. Showers*, for the respondent.

STRAHAN, C. J. Upon the argument of this cause several objections were made to the plaintiff's right to maintain this suit, which will be separately noticed so far as may be necessary to a proper disposition of this cause.

1. It is first claimed by the appellant that this suit cannot be maintained, for the reason its object is purely legal,—that is, to recover the possession of the warrants in controversy; but this objection overlooks one element in the plaintiff's case. At the time of the assignment of the warrants they were not in existence, and such assignments therefore could not create a strictly legal title. At most it could only create an equity; that is, a right or interest over which courts of equity have been accustomed to exercise jurisdiction, and in proper cases, to protect and make effectual, according to the intention and rights of the parties. The principle is stated in 1 Pomeroy's Eq. Jur., sec. 168, as follows: "The assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency, which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership or property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permitted the creation and transfer of such an ownership." After stating the effect of modern legislation upon this rule, the learned author continues: "Whatever may be the effect of these statutes in abridging or rather in removing occasion for the jurisdiction of equity, it is plain that the jurisdiction must still exist in the cases where a thing in action or demand, purely equitable in its nature, is assigned, and where the assignment itself is equitable, that is, does not operate as an assignment at law, and where any species of possibility or expectancy, not within the scope of the statutes, is

transferred." And 2 Am. Law Reg., N. S., 527, recognizes this rule of law. This ancient head of equity jurisdiction is not destroyed by any statute that I am aware of, and must therefore still exist, and I think the case made by the plaintiff falls precisely within it. The fact that the plaintiff sought to enjoin the action at law in no way impairs the jurisdiction of equity. It is manifest that the complaint, or that part of it which seeks to lay a foundation for an injunction, is wanting in fullness and particularity of statement; but as we have seen, the complaint would still be sufficient on the other ground suggested, if all relating to the injunction were stricken out.

2. At the time the plaintiff took the assignments of these warrants he was president of the common council of the city of East Portland, and it is claimed that by reason of a particular provision of the charter of the city, he could acquire no title to such warrants. The provision is as follows: "No member of the common council or any officer of the city shall be interested in any contract or job the expenses of which are paid out of the city treasury": Laws 1885, 314. This is a wise and proper provision, and if we could see that the assignment of these warrants to the plaintiff made him interested in the job, within the meaning of this prohibition, it would be our plain duty to turn him out of court without any kind of redress. But here the evidence shows that the contract was completely executed before the assignment. All the contractors were to do had been performed, and what the plaintiff did was to take an assignment which entitled him to receive Woods's part of the warrants. This fact does not bring the plaintiff within the purpose of this inhibition, or within the letter of the statute.

3. The defendant Franey does not claim to own these warrants, but his contention is, that, the contract being joint, Woods bought lumber for side and cross walks, and is still indebted therefor, and that a claim is being made against him for payment, and that Woods's creditor seeks to charge him as a partner. Woods and Franey not being partners, Woods could do no act that would charge Franey as a partner or in any manner render him liable on Woods's account, without his own acquiescence or consent, and the fact that some person may set up a claim against Franey, which, so far as appears, is without foundation, would furnish no reason for taking these warrants, for which the plaintiff and Hall Brothers



have paid a full consideration, and turn them over to Franey to indemnify him against such a possibility.

We think the decree of the court below is right, and the same is affirmed.

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**ASSIGNMENT OF AN EXPECTANCY — ENFORCEMENT IN EQUITY.**— Equity will uphold assignments of contingent interests or expectancies and things resting in a mere possibility, if fairly made and not against public policy: *Patterson v. Caldwell*, 124 Pa. St. 455; 10 Am. St. Rep. 598, and note. The undivided part of a demand may be assigned and transferred: *Whittemore v. Judd etc. Co.*, 124 N. Y. 565; 21 Am. St. Rep. 708, and note. A contract to buy and sell fruit to be raised on a certain place for a number of years to come may be assigned: *Cutting etc. Co. v. Packers' Ex.*, 86 Cal. 574; 21 Am. St. Rep. 63, and note. Moneys to become due may be assigned: *Norton v. Whitehead*, 84 Cal. 263; 18 Am. St. Rep. 172, and note. An assignee of a part of a debt acquires a right of action in equity against the debtor: *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467, and extended note; *Schleeman v. Bowlin*, 36 Minn. 198. A claim for services to be performed under a contract may be assigned: *Adler v. Kansas City etc. R. R. Co.*, 92 Mo. 242; *Provencher v. Brooks*, 64 N. H. 479. The right to make and vend a certain article in a prescribed territory may be assigned: *Spence v. Smith*, 101 N. C. 234. Contracts are assignable: *Kingsbury v. Burrill*, 151 Mass. 199. An assignment of his estate in expectancy by the heir is fraudulent and void as to existing creditors: *Read v. Mosby*, 87 Tenn. 769.

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## WISEMAN v. NORTH PACIFIC RAILROAD COMPANY.

[20 ORSON, 425.]

**SECONDARY EVIDENCE OF CONTENTS OF WRITINGS** is admitted on the theory that the original cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence.

**SECONDARY EVIDENCE OF WRITING — REASONABLE DILIGENCE TO PROCURE ORIGINAL.** — A party seeking to introduce secondary evidence of a writing alleged to be lost or destroyed must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

**SECONDARY EVIDENCE OF WRITING. — DEGREE OF DILIGENCE REQUIRED** in any case, in an effort to produce an original document alleged to be lost or destroyed, in order that secondary evidence of its contents may be admissible, depends upon the character and importance of the document, the purpose for which it is expected to be used, and the place where a paper of that kind might naturally be supposed to be found. If the document is valuable and important, a more diligent search is required than if it is of little or no value, and so the purpose for which it is proposed to use it has an important bearing in determining the degree of diligence required.

**SECONDARY EVIDENCE OF WRITING OUTSIDE OF STATE.** — Where the defense is based upon an alleged contract in writing, the execution and com-

tents of which are denied, proof that it is in the possession of a person outside the state will not admit secondary evidence of its contents, in the absence of proof that proper effort has been made to obtain the original in the place where it would be most likely to be found.

ACTION to recover the value of household goods alleged to have been lost by defendant in transit. The defendant admitted the loss of the goods while in its hands as a connecting carrier, but claimed, as a defense, that the goods were shipped under a contract that if the goods were totally lost while in transit, the carrier in whose hands they were at the time should be liable only to the extent of five dollars per hundred-weight on the goods lost. The defendant also claimed that the goods were shipped under a contract for reduced rates of freight, in consideration of which plaintiff agreed to release any and all carriers for loss or damage to the goods while in transit. The plaintiff denied the execution of the contract and release, but at the trial, defendant introduced evidence tending to show its execution by plaintiff; that it was executed in duplicate, one copy attached to the bill of lading, while the agent of the original carrier, at Nunica, Michigan, forwarded the other to traffic manager of that road at Chicago, Illinois. The defendant then called its claim clerk at Portland, Oregon, who testified that he had telegraphed to the claim agent of defendant at St. Paul, Wisconsin, to ascertain if a release had been made on plaintiff's goods shipped from Nunica, and if so, to send the original; that he had received a reply that the office of the traffic manager at Chicago had been searched, and that the release could not be found; that the release had never been in his office at Portland, and that no release was attached to the way-bill when it reached its destination. The defendant then offered the deposition of the agent at Nunica to show the contents of the release, but the court refused to admit such secondary evidence of its contents, and from this ruling the defendant appealed.

*Dolph, Bellinger, Mallory, and Simon*, for the appellant.

*J. N. Teal and Sanderson Reed*, for the respondent.

BEAN, J. By section 691, Hill's Code, it is provided that "there shall be no evidence of the contents of a writing other than the writing itself, except in the following cases: . . . 2. When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default."

This section is a declaration of the common-law rule. The theory upon which secondary evidence of the contents of a writing is admitted is, that the original writing cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence. The question is always one of diligence in the effort to procure the original. No precise rule has been or can be laid down as to what shall be considered a reasonable effort, but the party alleging the loss or destruction of the document is expected to show "that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him": 1 Greenl. Ev., sec. 558; *Simpson v. Dall*, 3 Wall. 460; *Johnson v. Arnswine*, 42 N. J. L. 451; 38 Am. Rep. 527; *Kelsey v. Hammer*, 18 Conn. 811. Thus in *Mariaer v. Saunders*, 5 Gilm. 117, the court says: "From the nature of the subject, there is some difficulty in laying down a general rule defining the extent and vigilance of the search which a party must make before the court may conclude that the paper is destroyed or lost. As a general rule, however, we may say that when, from the ownership, nature, or object of a paper, it has properly a particular place of deposit, or where, from the evidence, it is shown to have been in a particular place or in particular hands, then that place must be searched by the witness proving the loss, or the person produced into whose hands it has been traced. The extent of the search to be made in such place or by such person must depend in a great degree upon the circumstances. Ordinarily, it is not sufficient that the paper is not found in its usual place of deposit, but all papers in the office or place should be examined. On the whole, the court must be satisfied that the paper is destroyed and cannot be found. It is true the party need not search every possible place where it might be found, for then the search might be interminable; but he must search every place where there is a reasonable probability that it may be found." This rule is founded on reason and justice, and to require any less degree of diligence would be to defeat the object of reducing agreements to writing. As was said in *Ranlin v. Crow*, 19 Ill. 629: "The party wishing to avail himself of the benefit of such secondary evidence should be required to make at least the same effort that it is expected the party would make if he were to lose the benefit of the evidence if the instrument were not found."

The degree of diligence which shall be considered necessary in any case will depend upon the character and importance of the document, the purposes for which it is expected to be used, and the place where a paper of that kind may naturally be supposed to be found. If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search will be required than if the document is of little or no value. The purposes for which it is proposed to use it on the trial will also have an important bearing in determining the degree of diligence required. If the cause of action or defense is founded on the supposed writing, the party offering the evidence will be required to show a greater degree of diligence in the attempt to produce the original than if it is desired to be used as evidence in some collateral matter. The proof of search and proof of loss required is always proportionate to the character and value of the paper supposed to be lost: *American Life Ins. Co. v. Rosenagle*, 77 Pa. St. 507.

The existence and contents of the supposed contract, as well as the claim of defendant based upon it, is denied by the plaintiff in the case at bar. The issue thus being joined, its execution and contents were very material to defendant in establishing its defense. Indeed, defendant seeks to exempt itself from liability solely by reason of this contract. It admits having received as a common carrier plaintiff's goods, and that while in its possession they were destroyed, but it seeks to escape liability by virtue of this contract. It then became of the utmost importance to both plaintiff and defendant that the original contract, if such a contract was made at all, be produced on the trial, so that there might be no controversy as to its contents, and that the court might declare its legal effect to the jury. Before defendant should be permitted to give secondary evidence of its contents, it should prove that it had exercised the utmost diligence to procure the original (*Smith v. Cox*, 9 Or. 327), and this it failed to do. No competent evidence whatever was offered to prove any search in the office of the traffic manager at Chicago, where it was shown the document was most likely to be found. All that the witness Watts said about the supposed search was clearly hearsay, and incompetent evidence: *Lawrence v. Fulton*, 19 Cal. 683. It did not in any way tend to prove that any effort had been made in the Chicago office to find the original paper. The testimony of the traffic man-

ager, or some person in his office having the custody of such papers, should have been had, or some proper effort made to obtain it, showing what effort, if any, had been made to find the original. Indeed, counsel for defendant did not seriously contend that it had brought itself within the rule concerning the admission of secondary evidence, if proof of the loss of the original is required, but he claimed that all that was necessary for defendant to do was to show that the original was in the possession of a person outside of this state, and that no further proof was required; that when it showed that the original contract was in Chicago, it was entitled to give secondary evidence of its contents without further proof; and, in support of his position, cites the following authorities: *Burton v. Driggs*, 20 Wall. 134; *Gordon v. Searing*, 8 Cal. 49; *Beattie v. Hilliard*, 55 N. H. 428; *Brown v. Wood*, 19 Mo. 475; *Shepard v. Giddings*, 22 Conn. 282; *Ralph v. Brown*, 3 Watts & S. 395; *Gordon v. Tweedy*, 74 Ala. 232; 49 Am. Rep. 813.

The broad doctrine is stated in these authorities that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers. As we have already said in effect, each case must largely depend on its own particular circumstances as to what showing is sufficient in order to admit secondary evidence of the contents of a writing, and the language used in the cases above cited must be interpreted in the light of the facts of each case. None of these cases goes so far as to hold that where a defendant relies upon the contents of a writing to exempt himself from liability, and both the execution and contents of the supposed writing are denied, and the alleged writing is shown to be in the possession of a person outside of the state, that secondary evidence of the contents of such writing is admissible unless an effort is made to produce it. And besides, the doctrine stated in these authorities is denied by authorities of equal weight, and even by some of the same courts. Thus in *Turner v. Yates*, 16 How. 14, it was held that proof that an invoice of goods was in London was not a sufficient showing to admit secondary evidence of its contents in the circuit court of the United States for the district of Maryland, the court saying: "If the paper was in the hands of the consignees in London, secondary evidence was not admissible. If as parties, they

were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it": *Wood v. Cullen*, 13 Minn. 394; *Dickinson v. Bredsen*, 25 Ill. 186; *McGregor v. Montgomery*, 4 Pa. St. 237; Wharton on Evidence, sec. 180. The rule laid down in the authorities just cited, we think, is founded on reason and justice, and imposes no hardship on the defendant. By defendant's own showing, the last known place of deposit of the contract it claims plaintiff executed was in the office of the traffic manager in Chicago; and the law provides an easy and simple method of taking the deposition of a witness residing out of the state; and his deposition should have been taken, or some proper effort made to obtain it. The fact that the person to whose possession the paper was traced resided out of the state did not excuse defendant from a diligent effort to procure it.

Judgment of the court below is therefore affirmed.

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**SECONDARY EVIDENCE OF THE CONTENTS OF WRITINGS.**—Before secondary evidence of the contents of a written instrument can be received, it is necessary to prove the existence and genuineness of the original: *Oliver v. Persons*, 30 Ga. 391; 76 Am. Dec. 657; *Calhoun v. Calhoun*, 81 Ga. 91; *Stocking v. St. Paul T. Co.*, 39 Minn. 410; *Ganther v. Bennett*, 72 Md. 385; that the original is lost or destroyed: *Bell v. Byerson*, 11 Iowa, 233; 77 Am. Dec. 142; *Fresno Canal Co. v. Dunbar*, 80 Cal. 531; *Coffing v. Carnahan*, 122 Ind. 427; *Smith v. Brown*, 151 Mass. 338; *Lyons v. Van Gorder*, 77 Iowa, 600; *Woods v. Burke*, 67 Mich. 674; or without the jurisdiction of the court: *Knickerbocker v. Wilcox*, 83 Mich. 200; 21 Am. St. Rep. 595; *Woods v. Burke*, 67 Mich. 674; *Harvey v. Edens*, 69 Tex. 420; or that it is in the possession of the adverse party, who refuses to produce it: *Jones v. Robinson*, 11 Ark. 504; 54 Am. Dec. 212; *Johnson v. Johnson*, 70 Mich. 66; *Gafford v. American etc. Co.*, 77 Iowa, 736; and that the party himself used diligence to procure the original, but is unable to do so: *Commonwealth v. Jeffries*, 7 Allen, 443; 83 Am. Dec. 712; *Tanner v. Hall*, 69 Ala. 628; *Burke v. Bragg*, 69 Ala. 204; *Coffing v. Carnahan*, 122 Ind. 427; *Powell v. Wallace*, 44 Kan. 656; *Shankler v. Bonander*, 80 Mich. 531. See also *Georgia P. R'y Co. v. Strickland*, 30 Ga. 776; 12 Am. St. Rep. 282, and note.

## STATE v. JARVIS.

[20 ORSON, 437.]

**CRIMINAL LAW — INCEST — EVIDENCE.** — On the trial of a charge of incest, evidence as to violence used in the commission of the crime charged is inadmissible.

**CRIMINAL LAW — INCEST — RAPE — EVIDENCE.** — Rape and incest are two distinct crimes, and while evidence of the violence used in the commission of the former is admissible, such evidence is not admissible under an indictment charging the latter crime alone.

**CRIMINAL LAW — RAPE — INCEST.** — Rape by forcible ravishment, and incest, cannot be committed by the same act, as incest is accomplished by the concurring assent of two persons, while rape is committed through the impelling will of one.

**CRIMINAL LAW — INCEST — RAPE — EVIDENCE.** — Evidence showing the commission of rape will not sustain a conviction under an indictment charging incest alone.

**CRIMINAL LAW — INCEST — EVIDENCE.** — One charged with incest cannot be convicted on the uncorroborated evidence of the prosecutrix alone.

**CRIMINAL LAW — INCEST.** — **INDICTMENT** charging incest must allege that the act charged was the joint act of both parties.

*Alfred F. Sears*, for the appellant.

*W. T. Hume*, for the respondent.

**BEAR, J.** In *Stats v. Jarvis*, 18 Or. 360, this defendant had been convicted of incest under an indictment charging him with both the crimes of rape and incest, but this court reversed the judgment, on the ground that the conviction was had on the uncorroborated testimony of the prosecutrix, who was an accomplice in the commission of the crime. After the case was remanded to the court below, it would seem, another indictment was found against the defendant, charging him with the crime of incest alone, upon which he was tried and convicted, from which he appeals. The first assignment of error necessary to notice is in the admission of the testimony of Mrs. Dr. Murray. The testimony of this witness was to the effect that three or four or five years before the trial in the court below, she was consulted professionally by the prosecutrix, whom, on an examination, she found suffering from some irritation of the vagina, caused by some recent violence. This evidence was clearly irrelevant. It did not in any way tend to prove the guilt of this defendant. It is possible the evidence might have been competent had the charge against defendant been rape, and not incest. It could only be competent under the theory that the prosecutrix had been forcibly ravished; but when, as in this case, the crime charged is incest,

it could in no way tend to prove that defendant was guilty as charged. Rape and incest are two distinct crimes, and what would be competent evidence in the one would not in the other. What has already been said requires the reversal of this case; but there was another question raised in the argument, which it is proper for us to consider, in view of the probability of another trial in the court below.

In the case of *State v. Jarvis*, 18 Or. 360, in which this appellant was defendant, it was held that "in a trial for the crime of incest, the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her evidence, unless she be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

It is admitted, in the case at bar, that the conviction was had upon the uncorroborated testimony of the prosecutrix, but it is sought to avoid the rule announced in the case above cited, by claiming that she was compelled by force and threats to submit to the embraces of defendant, and was not, therefore, a willing participant in the commission of the crime, and not an accomplice. The prosecutrix testified that the incestuous intercourse commenced in 1884, when she was sixteen years old, and continued as often as twice a week, and sometimes oftener, until April, 1889; that at no time did she willingly consent, but was compelled by force to submit; that at one time defendant pointed a pistol at her, and said he would kill her if she refused; at another time he threatened her with an ax; and at another, with a board; that she did not complain to any one, because defendant said he would shoot her if she told anybody about the matter. It was argued for the appellant that the crime of incest requires the concurring assent of both parties, and that under the facts in this case defendant was guilty of rape, if guilty of any crime, and could not be convicted of the crime of incest. The crime of incest was not indictable at common law, but is so only by statute: 4 Bla. Com. 64; Bishop on Statutory Crimes, sec. 728. To the statute alone, then, must we look for a definition of the crime and for a solution of the question in this case. By section 1873, Hill's Code, it is provided: "If any persons being within the degrees of consanguinity within which marriages are prohibited by law shall intermarry with each other, or shall commit adultery or fornication with each other, such persons, or either of them, upon conviction thereof, shall be punished,"



etc. It will be noticed that the language of the statute is 'with each other,' which necessarily implies a concurrent act, and the consent of both parties. If one of the parties is compelled by force to submit to the act, there can be no consent of such party, and the act cannot be committed with each other, as declared by the statute. Similar provisions in the statutes of sister states have been construed by the courts, and the overwhelming weight of authority is in favor of the construction above indicated. Thus in *People v. Jenness*, 5 Mich. 321, it is said by Christy, J.: "This offense [incest] can only be committed by the concurrent act of two persons of opposite sexes; and the assent or concurrence of the one is as essential to the commission of the offense as that of the other; and as a general rule, both must be guilty, or neither." In *Delany v. People*, 10 Mich. 241, the information was based on a statute the language of which was as follows: "If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, every such person shall be punished," etc.; held, that the offense was joint, and both parties must be guilty, or neither. In *De Groat v. People*, 39 Mich. 124, under a statute the language of which is the same as ours, it was held that conviction could not be had unless the act was by concurrent assent of both parties.

Cooley, J., speaking for the court, said: "Fornication, when the element of near relationship makes it incest, may be an offense equally detestable and heinous, but it still lacks the distinguishing characteristic of rape. The one is accomplished by the impelling will of one person, and the other by the concurrent assent of two." In *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691, the statute provided, "if any step-mother and her step-son shall have sexual intercourse together," etc., and it was held that the act must be joint, and one of the parties cannot be guilty unless the other is also, and the acquittal of one is a bar to the trial of the other. So in *State v. Thomas*, 53 Iowa, 214, under a statute which provided that "if any persons within the prohibited degrees . . . carnally know each other, they shall be deemed guilty of incest," it was held that the crimes of rape and incest cannot be committed by the same act, the consent of both parties to the connection being necessary to constitute the crime of incest under the statute. In *Yeoman v. State*, 21 Neb. 171, the statute provided that "persons within certain degrees, who shall commit adultery or fornication with each other, shall be punished," etc., it was held

that one of the parties might be indicted alone; but the court said: "It is true that both must be guilty, that the intermarriage, cohabitation, adultery, or fornication must be by a union of minds as well as of actions." In *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321, it was held that where the evidence proves the crime of rape, the party cannot be convicted of the crime of incest. So in *People v. Harridan*, 1 Park. Cr. 344, it was held, under a statute similar to ours, that when the illicit connection is accomplished by force, the defendant cannot be convicted of incest, but only of rape. In *Noble v. State*, 22 Ohio St. 545, by way of argument it is said: "The crime of incest is committed by two willing parties."

A doctrine contrary to that laid down in the authorities before referred to has been held in *Mercor v. State*, 17 Tex. App. 452, and *People v. Barnes*, Idaho, Jan. 25, 1886, 9 Pac. Rep. 532. The Texas case is based upon former decisions of the same court, and one Michigan *nisi prius* case which has been repudiated by the court of last resort of that state, as we have already seen. The Idaho case is not in point in the case before us. The statement of the law as given in 10 Am. & Eng. Ency. of Law, 341, is not believed to be supported by the weight of authority. The only cases cited as authority for the statement are the Texas and Michigan *nisi prius* cases, above referred to, and *Norton v. State*, 106 Ind. 163, which was under a statute wholly different from ours, while none of the adjudged cases announcing a contrary doctrine is cited, except *People v. Harridan*, 1 Park. Cr. 344. We think the decided weight of authority is, that under a statute like ours, the crimes of rape, by forcible ravishment, and incest, cannot be committed by the same act, but that of incest requires the concurring assent of both parties. We do not desire to be understood as holding it necessary that both parties must be guilty of the crime of incest before the guilty one can be punished. That question is not before us, and it will be time enough to decide it when presented. Possibly if the assent of one party was induced by fraud or deception, the party perpetrating the fraud might be guilty of incest, while the innocent party would not, or one party might be ignorant of the relationship, while the other had full knowledge of it; and so other circumstances might arise under which one party would be guilty and the other innocent. In the case before us, the defendant accomplished his purpose either by the consent of the prosecutrix or by force. If by her assent, she was an accom-

plise, and a conviction could not be had on her uncorroborated testimony: *State v. Jarvis*, 18 Or. 360; and if by force, the crime was not incest, and the conviction cannot stand.

Counsel for appellant contended on the hearing that the indictment is insufficient in not alleging that the illicit intercourse was by the concurring assent of both parties. This question seems to have been raised in this court for the first time, and perhaps the indictment is sufficient after judgment; but the logical conclusion from the authorities heretofore cited with approval is, that the indictment in cases of this kind should allege the act as joint, since it is only by the concurring assent of both parties that the crime can be committed.

The judgment of the court below is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

**CRIMINAL LAW—INCEST—EVIDENCE.**—In a trial for the crime of incest, the party to the crime not on trial is an accomplice, and the other party cannot be convicted on her uncorroborated testimony: *State v. Jarvis*, 18 Or. 360. The name given in an indictment to the offense charged is not of itself the charge of an offense, and a mistake would be an irregularity, and not fatal: *People v. Cuddihy*, 54 Cal. 53.

**CRIMINAL LAW—INCEST—RAPE.**—As to the distinction between these crimes, see note to *Commonwealth v. Bakeman*, 41 Am. Rep. 249.

## NEPPACH v. JONES.

[30 ORSON, 481.]

**EQUITY—STALE CLAIM; QUESTION OF FACT.**—What constitutes a stale claim in equity is not determined by lapse of time alone, but the question must be determined by the facts and circumstances of each case, according to right and justice.

**EQUITY—STALE CLAIM—STATUTE OF LIMITATIONS.**—Equity in determining whether or not a claim is stale is not confined to the period named in the statute of limitations, but may refuse relief in cases where the delay is less or greater than that named in the statute.

**EQUITY—STALE CLAIM.**—An assignee of an insolvent, who without excuse delays ten years after the execution of the assignment in asserting claim to property which for five years has been in possession of one who purchased it at execution sale, and who, during that time, was openly asserting his title in court, presumably with the knowledge of the assignee, is not entitled to relief against such purchaser in equity. His claim is stale, and fatal to the merits of his suit as assignee.

*Nicholas and Osborn*, for the appellant.

*Ira Jones*, for the respondent.

LORD, J. This is a suit in equity to have a conveyance of certain lands therein described from the insolvent, William Ramsey, and its subsequent conveyance to the defendant, Jones, declared void, and the defendant required to convey the same to the plaintiff. The facts, in substance, were these: The insolvent, William Ramsey, made a general assignment for the benefit of his creditors on the twenty-third day of February, 1880, to one Pringle, but the court, in 1890, thereafter appointed the plaintiff in the present suit assignee. On the same day he executed a conveyance to one F. of the land in controversy, which was designed to pay or secure certain indebtedness as disclosed by the answer of the defendant, and soon thereafter died, leaving a will by which he devised all his right and title to the land in dispute to his executors. A few days prior to such assignment, the defendant and his partner had commenced an action and levied an attachment on the said land, and a certificate was filed as required by law upon the date of such assignment. Several years intervening, and no proceeding being taken under the assignment, and acting on the supposition that it had been abandoned, the defendant obtained judgment on the tenth day of March, 1885, upon which execution issued April 6, 1885, under which the land was sold, and he became the purchaser. Some year or so thereafter a litigation was commenced and carried on between the executors of F. and the defendant, which was finally adjusted and settled, and the possession and title of F. were transferred to the defendant on the fifteenth day of December, 1888, who has since been in possession, and claims that the rights of the plaintiff are barred by the statute of limitations. It thus appears that the deed and assignment were more than ten years old, and that no proceedings had been taken under the assignment until the commencement of the present suit alleging that the deed to F. was fraudulent, and praying that it be declared void. The pleadings, and especially the answer, are quite voluminous in setting forth *in extenso* the action and proceedings in the attachment, and the sale made thereunder, the litigation instituted by the executors of F. to recover the property in controversy, and its final settlement, and the payment of a large sum by the defendant, and the proceedings taken under the assignment, showing that nothing had been done, or that it was in course of settlement, and other facts designed to exhibit the staleness and inequity of the claim and suit of plaintiff as against the rights of the defendant to the

land in controversy. There is nothing in the record which specifies the ground upon which the suit of the plaintiff was dismissed and the title of the defendant as against the plaintiff confirmed, other than the decree of the court which "finds from the answer of the defendant, and not denied by the reply of the plaintiff, that the equities of the suit are with the defendant." This, we conceive, proceeded mainly upon the ground that the facts set up in respect to the assignment, and the laches and delay of the plaintiff while the defendant was harassed by litigation for the recovery of the property in dispute,—the title of F., which he finally procured by a settlement and payment to the executors of a large sum of money, — not denied or explained, exhibited a stale claim or equity which was fatal to the merits of his suit as assignee; that the case as it stood confessed on the pleadings at the hearing, by reason of such delay and laches of the plaintiff, were such as would render a court of equity passive, or justify its refusal to grant relief.

There is certainly nothing shown even to indicate what were the impediments to an earlier prosecution of the suit to secure the land in controversy for the payment of the claims alleged, or how, under the circumstances, he could have remained so long ignorant of his rights as such assignee, when so much was openly transpiring calculated to awaken his knowledge, if any rights he had, and no means were used to fraudulently keep him in ignorance of them.

What constitutes a stale equity is regarded as a vexed question hardly susceptible of an accurate definition; it is not length of time alone that is a test of staleness, but the question must be determined by the facts and circumstances of each case, and according to right and justice. Nor in determining whether or not the claim is stale is the court confined to the statutory period, but may refuse relief in cases where the delay is less or greater than that named in the statute. From the original appointment to the commencement of the present suit, no action has been taken or anything done, although covering more than the statutory period, to indicate that any insolvent estate was in the course of settlement or pending; and it was certainly the duty of the plaintiff, if necessary for any cause, to seek the aid of a court of equity without unreasonable delay, for during the interval the defendant was pursuing modes to secure and perfect his rights upon principles substantially equitable, and without any

fraudulent concealment; and as the facts conceded in the pleadings, in our judgment, indicate that he could not have been without knowledge of the existence of such rights, and the defendant's conduct in the interim, he must have regarded such rights acquired by the defendant as just and equitable, and acquiesced in them, otherwise negligence would seem justly imputable to him. In *Linsay Petroleum Co. v. Hurd*, 5 P. C. Cas. 8, Eng. R. 196, the court says: "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . Two circumstances, always important in such cases, are, the length of the delay, and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

Upon analogous principles, the lapse of time, especially when there was equal means of knowledge of the original transaction, and a failure to take any steps under the assignment, and no explanation or excuse for such delay, while at the same time the defendant was seeking openly in the same court to protect his title to the land in controversy from the action of the executors, and expending large sums in the settlement of such litigation, combined with all the circumstances set forth, much of which is matter of record, bring the case within the rule that lapse of time and staleness of the equity or claim requires, upon principles of equity and justice, that the decree of the court below be affirmed and the bill dismissed.

#### ON REHEARING.

**PER CURIAM.** The point suggested as to the assignee is immaterial. It is the staleness of the proceeding, under the circumstances, which influenced the judgment of the court.

**EQUITY—STALE CLAIM.**—The maxim that equity aids the vigilant, and not those who slumber on their rights, is applied to one who holds a stale equitable title: *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761, and note. One who desires the aid of equity should seek it with reasonable diligence.

*Sumner v. Kellogg*, 38 Minn. 197; 3 Am. St. Rep. 661, and note; *German-John et al. v. Mylin v. Fisher*, 60 Pa. St. 124; 100 Am. Dec. 546, and note; *Hudson v. Legton*, 5 Harv. (Del.) 74; 48 Am. Dec. 167, and note. A court of equity has always refused to aid stale demands: *Douglas v. Douglass*, 72 Mich. 96; *Montgomery v. Noyes*, 73 Tex. 208; *Brown v. Roberts*, 75 Tex. 163. The defense of stale demand will not avail in favor of one who sets it up against a claim that has accrued within ten years: *McCaynbell v. Duret*, 73 Tex. 410.

**EQUITY — STALE CLAIM — STATUTE OF LIMITATIONS.** — Ordinarily, courts of equity adopt the time fixed by the statute of limitations for barring claims, but this rule is not inflexible, and may depend upon the allegations and proof: *Reynolds v. Sumner*, 126 Ill. 56; 9 Am. St. Rep. 523, and note. In cases where equity has exclusive jurisdiction, the statute will not be applied: *Dugan v. Gittings*, 3 Gill, 186; 43 Am. Dec. 306, and note; *Mosatt v. Wright*, 1 Wend. 365; 19 Am. Dec. 508, and note; *Shelby v. Shelby*, Cooke, 179; 5 Am. Dec. 686, and note.

**LACHES AS A BAR TO RELIEF IN EQUITY.** — It is, and long has been, the invariable practice of courts of equity to deny relief to one who has resorted to them after unreasonable delay, though no statute of limitations was applicable to his suit: *Hanner v. Moulton*, 138 U. S. 495 (thirteen years); *Harris v. Hillegass*, 66 Cal. 79 (twenty years); *Golden v. Kimmell*, 99 U. S. 201, 210 (fourteen years); *Codman v. Rogers*, 10 Pick. 119 (seventeen years); *Groenendyke v. Coffeen*, 169 Ill. 339 (sixteen years); *Matter of Neilley*, 95 N. Y. 390; 2 Story's Eq. Jur., sec. 1520.

The rule upon this subject is well stated in the following language, from the decision of the supreme court of the United States in the case of *Speidel v. Hewick*, 120 U. S. 387: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court': *Smith v. Clay*, 3 Brown Ch. 640, note. This doctrine has been repeatedly recognized and acted on here: *Platt v. Fattier*, 9 Pet. 405; *McKnight v. Taylor*, 1 How. 161; *Bowman v. Wathen*, 1 How. 186; *Wagner v. Baird*, 7 How. 234; *Badger v. Badger*, 2 Wall. 87; *Hume v. Beale*, 17 Wall. 386; *Marsh v. Whitmore*, 21 Wall. 178; *Sullivan v. Portland and Kennebec R. R. Co.*, 94 U. S. 806; *Golden v. Kimmell*, 99 U. S. 210. In *Hume v. Beale*, 17 Wall. 348, the court, in dismissing, because of unexplained delay in suing, a bill by *cestui que trust* against a trustee under a deed, observed that it was not important to determine whether he was trustee of a mere dry legal estate or whether his duties and responsibilities extended further. See also *Bright v. Legerton*, 29 Beav. 60, and 2 De Gex, F. & J. 606. When the bill shows upon its face that the plaintiff, by reason of lapse of time and his own laches, is not entitled to relief, the objection may be taken by demurrer: *Maxwell v. Kennedy*, 8 How. 210; *National Bank v. Carpenter*, 101 U. S. 67; *Landsdale v. Smith*, 106 U. S. 391."

The views thus expressed have been adopted by the supreme court of California in several cases, and are thus stated at length in the decision of *Bell v. Hudson*, 73 Cal. 287: "In the view we take of the case, it is unnecessary to pass upon the first question. Assuming in favor of the plaintiff what we

are inclined to think is true,— viz., that the trust is not one of those implied trusts against which the statute runs, — we think that so far as the claim for relief is founded upon the partnership transaction it is stale, and that a court of equity will not aid its enforcement. This is a defense peculiar to courts of equity, and applies, although no statute of limitations governs the case: *Harwood v. Railroad Co.*, 17 Wall. 81; *Sullivan v. Portland etc. R. R. Co.*, 94 U. S. 811; *Goddin v. Kimmell*, 99 U. S. 201; *Sheldon v. Rockwell*, 9 Wis. 181; 76 Am. Dec. 265; *Harrison v. Gibson*, 23 Gratt. 212; *Stout v. Seabrook*, 30 N. J. Eq. 189, 190; *Matter of Neiley*, 95 N. Y. 390; *Groenendyke v. Coffeen*, 109 Ill. 329; 2 Story's Eq. Jur., sec. 1520. It is not the same thing as equitable estoppel, although it has been termed a *quasi* estoppel: 2 Pomeroy's Eq. Jur., secs. 816, 817; and hence the rules governing equitable estoppel (see *Boggs v. Merced Mining Co.*, 14 Cal. 279) do not apply. The ground of the doctrine was stated by Taney, C. J., delivering the opinion of the supreme court of the United States in *McKnight v. Taylor*, 1 How. 168, as follows: 'We do not found our judgment upon the presumption of payment, for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost.' The principal foundations of the doctrine are acquiescence and lapse of time. . . . Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction: See *Mooers v. White*, 6 Johns. Ch. 360; *Barnes v. Taylor*, 27 N. J. Eq. 259; *German-American Seminary v. Kiefer*, 43 Mich. 111; *Bolton v. Dickens*, 4 Lea, 577; *Hatcher v. Hall*, 77 Va. 578. So it has been held that a change in the value and character of the property may be material: *Bliss v. Prichard*, 67 Mo. 187; *Allen v. Allen*, 47 Mich. 79. But as stated by Davis, J., in *McQuiddy v. Ware*, 20 Wall. 19, 'there is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances.' In other words, the question is addressed to the sound discretion of the chancellor in each case: *Brown v. County of Buena Vista*, 95 U. S. 160; *Rayner v. Pearseall*, 3 Johns. Ch. \*586; *Landrum v. Union Bank*, 63 Mo. 56."

In *Piatt v. Vattier*, 9 Pet. 416, a suit was brought by one claiming a right to a conveyance of a lot of land in Cincinnati after a great lapse of time, but the statute of limitations did not constitute any bar to the action, — 1. Because it was not pleaded nor relied upon; and 2. Because one of the parties, by his non-residence or absence from the state, was within one of the exceptions of the local statute of limitations, but the court declared "that the lapse of time is, upon the principle of the court of equity, a clear bar to the present suit, independently of the statute."

It has been insisted that the defense of laches could not be asserted by way of demurrer, because the court could not know what facts and circumstances may have existed to excuse the complainant's delay. The reply to this is, that the courts require the complainant to state what excuse, if any, he has for his delay, and will dismiss his bill if a sufficient excuse is not given, and will do this either upon demurrer or in the absence of demurrer, upon the mere suggestion that the claim is stale. In other words, it is a part of the complainant's cause of action to show that his claim is not stale: *Bell v.*



*Hudson*, 73 Cal. 285; *Speidel v. Henrici*, 120 U. S. 387; *Harris v. Hillegas*, 66 Cal. 79.

Many of the cases in which the suggestion that the claim was stale has been sustained were suits for an accounting, but the rule is not confined to suits of that class nor founded upon considerations peculiar to them, but rests upon the broad principle that equity will not act upon stale claims of any character. The following were not suits for an accounting, unless every suit to enforce a trust may be so regarded, nor were any of them decided upon the ground of the statute of limitations operating either directly or by analogy. In every instance the court refused relief because the claim was stale, except in the case of *West v. Russell*, 74 Cal. 544, in which two out of three judges placed their concurrence in the opinion on the ground of the staleness of the claim. See *Birdsall v. Johnson*, 44 Mich. 124 (to remove doubt from title); *Bliss v. Prichard*, 67 Mo. 181 (to establish an involuntary trust); *West v. Russell*, 74 Cal. 544 (to compel transfer of one half of property); *Coddington v. R. R. Co.*, 103 U. S. 409 (to rescind contract); *Shorter v. Smith*, 56 Ala. 210 (to declare a trust); *Hanner v. Moulton*, 133 U. S. 486 (to cancel deeds and establish title); *Speidel v. Henrici*, 120 U. S. 387 (to establish trust); *Hume v. Beale*, 17 Wall. 336 (to recover for breach of trust); *Richards v. Mackall*, 124 U. S. 183 (to set aside a sale); *Platt v. Vattier*, 9 Pet. 416 (to establish a trust); *Godden v. Kimmell*, 99 U. S. 201 (to establish a trust); *Ostner v. Watrod*, 83 Ill. 171 (to compel conveyance).

## HOME MUTUAL INSURANCE COMPANY v. OREGON RAILWAY AND NAVIGATION COMPANY.

[30 OREGON, 500.]

**INSURANCE—SUBROGATION OF INSURER.**—Where property insured is destroyed by and through the negligence of a third party, the insurer, paying the loss, is, to the extent of his payment, subrogated to the rights and remedies of the owner against the wrong-doer.

**INSURANCE—SUBROGATION OF INSURER—PARTIES PLAINTIFFS.**—Where the value of property insured, and destroyed through the negligence of a third person, exceeds the amount of insurance paid, the insurer, by making such payment, only acquires a joint interest with the owner to the extent of the payment in the cause of action against the wrong-doer to recover the whole loss, and in bringing such action, both the insurer and the owner must be joined as co-plaintiffs.

**ACTION** by the plaintiff insurance company alone as plaintiff to recover of the defendant company the sum of \$19,888.14 paid by plaintiff to one Koontz as insurance on building totally destroyed by fire caused by the negligence of the defendant company. The total value of the property destroyed was \$36,361.72. The defense of the defendant company consisted of a general denial, and the further defense that, prior to the commencement of this action, Koontz sued the defendant company for the total amount of his loss, and in that action re-

covered judgment for the sum of seventeen thousand five hundred dollars, which judgment was fully paid by the defendant company as total compensation for the injury caused him by said company; that prior to the commencement of said action the plaintiff company had full knowledge of the loss; that during the pendency of such action, and before its final termination and the payment of the judgment therein, the defendant company notified the plaintiff company thereof, "and requested it to take such steps as it might deem necessary to protect any interest or claim upon the proceeds of the judgment, to be recovered therein, which it might have; that the insurance company, upon the receipt of such notice, disclaimed any right, title, or interest in the said judgment in favor of Koontz, or the proceeds thereof, and declined to take any steps, legally or otherwise; and that by reason of the failure of the insurance company to unite with the said Koontz in the prosecution of said action, and failure to disclose their interest, and to take any steps to prevent the collection of such judgment, whereby Koontz was permitted to receive the entire proceeds of said judgment, the insurance company was guilty of a fraud upon the rights of the defendant, and is estopped from prosecuting this action." The plaintiff company demurred to the defense set up, as insufficient, and the demurrer being overruled, it appealed.

*John M. Gearin*, for the appellant.

*W. W. Cotton and Zera Snow*, for the respondent.

LORD, J. The question presented by the contention for the plaintiff is, that if a loss under a policy of fire insurance is caused by the wrongful act of a third person, the insurer, upon making payment to the insured *pro tanto*, is subrogated to the rights and remedies of the insured, and may maintain against the wrong-doer an action in his own name, and need not prosecute it in the name of the insured.

This action is brought by the plaintiff in its own right, upon the assumption that the effect of the insurance was to create in the plaintiff a pecuniary interest in the property insured, and that when it was destroyed by the wrongful act of the defendant, whereby it became liable, and was required to pay for the loss to the extent of the insurance to the insured, it became entitled to a legal remedy against the defendant in its own independent right, to the extent which it was compelled to pay for such loss occasioned by the defendant's

wrongful act. This involves an inquiry into the nature of the rights which the insurer acquires upon the payment of the insurance for a loss caused by the wrongful act of a third person. The right of the insurance company that has paid a loss, to recover of the wrong-doer after payment of such loss, rests upon the doctrine of subrogation in its application to insurance companies. "Every day," said Lord Mansfield, "the insurer is put in the place of the insured": *Mason v. Sainsbury*, 3 Doug. 58. Subrogation is purely an equitable result. It is the creation of equity, is not dependent on contract, and is enforced for the purpose of attaining the ends of justice. It grows out of the relation which the parties sustain to each other, and the party subrogated acquires no other or greater rights than those of the party for whom he is substituted. As the contract of insurance is one of indemnity, when a loss occurs by the negligent or wrongful act of a third party, and the insurer pays the insured, he is entitled, upon equitable principles, to be subrogated to the rights of the insured against the wrong-doer. Hence the general rule that when property which has been insured is lost or destroyed by the negligent or willful act of another, an action accrues in favor of the insured, and if the insurer pays the loss, he is subrogated to the rights of the insured, as against the wrong-doer, with all his rights as well as his remedies. "Where the property insured," says Mr. Wood, "is destroyed by the negligence of a third person, so that the assured has a remedy against him therefor, the insurer, by payment of the loss, becomes subrogated to the rights of the assured to the extent of the sum paid under the policy. The assured becomes trustee for the insurer, and by necessary implication the payment of the loss operates as an equitable assignment to the insurer to the extent of the sum paid under the policy": *Wood on Insurance*, sec. 499.

The owner and insurer, in respect to the ownership of the property, and the risk incident thereto, are considered but one person, having together the beneficial right to an indemnity against the wrong-doer whose negligent act occasioned the loss or destruction of the property. The liability of such wrong-doer to the owner is first and principal, and that of the insurer secondary, — not in order of time, but of ultimate liability: *Hart v. Western R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719; *Hall v. Newholls etc. R. R. Co.*, 18 Wall. 367. The insurer standing in no relation of contract or privity with those

who are responsible for the loss, his rights arise out of his contract of indemnity, and are derived from the assured alone, and can only be enforced in the right of the latter. "In any form of remedy," says Mr. Justice Gray, "the insurer can take nothing by subrogation but the rights of the assured": *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 321. The reason for the doctrine that the insurer must enforce his rights in the name of the owner against the wrong-doer or party first liable as principal, Tenny, J., said, was "wholly inconsistent with the principle that the insurer can, in his own name, recover for money paid on the contract of insurance in an action against the wrong-doer; for the insurer and assured being in effect one person, each cannot maintain an action at the same time and for the same loss, where there can be but one satisfaction": *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 256; 63 Am. Dec. 618. "It has long been settled," said Dyer, J., "both in England and in this country. that such a cause of action is single and indivisible, and that in a case like the present the insurer could not, at common law, sue the wrong-doer in his own name to recover the amount paid the assured, but must bring his action in the name of the assured": *First Pres. Soc. v. Goodrich Transp. Co.*, 7 Fed. Rep. 258.

Where the insurance company has paid the owner for the destruction of his property by fire occasioned by the fault of a railroad company, and afterwards the owner receives the amount from the company in satisfaction of his damages, he holds it in trust for the insurance company, and it may recover it from him by a suit in equity. So, too, if the railroad company has not paid the owner his damages for the loss, or has paid it to him knowing that he had received the amount of the insurance from the insurance company, the railroad company is liable to the insurance company in an action at law, which it has a right to bring in the name of the owner, without his consent, to repay it the damages to the amount of the sum paid by it, and that a release from the owner would be no defense to such an action: *Monmouth etc. Ins. Co. v. Hutchinson etc. R. R. Co.*, 21 N. J. Eq. 108. The subrogation of the insurer to the remedies of the insured for the destruction of the insured property, upon the payment of the loss, operates as an equitable assignment to the insurer to the extent of the amount paid. "It is in the nature," said Shaw, C. J., "of an equitable assignment, which authorizes the as-

signee to sue in the name of the assignor, for his own benefit": *Hart v. Western R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719.

It results, then, that the right, resting on the doctrine of subrogation, and not depending upon contract or privity, must be worked out through the right of the insured, or the owner of the property destroyed; that the remedy must be prosecuted in his name, unless the code of procedure which permits an action to be brought in the name of the real party in interest has changed this rule. The case of *Connecticut F. Ins. Co. v. Erie R'y Co.*, 73 N. Y. 399, 29 Am. Rep. 171, is relied upon to support this position. But in that case, the owner had fully settled his claim against the railroad company, but the contract showed that the amount of the policy was deducted from the amount of the loss in the settlement, so that the insurance company was the only remaining party in interest. The action being under the code of that state, which requires the action to be brought in the name of the real party in interest, by this settlement, the owner having no interest, it was held that the insurance company might properly bring the action. In *Ætna Ins. Co. v. Hannibal R'y Co.*, 8 Dill. 1, it was held by Dillon, J., that in a case where the property destroyed exceeded in value the amount insured, the rule of law had long been settled that the insurance company, on payment of the loss, cannot sue the wrong-doer in its own name, saying: "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gave rise to but one liability. If one insurer may sue, then if there are a dozen, each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago." And again: "But it is insisted that the provisions of the Missouri statute, that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action, not arising out of contract, changes the rule. However it might be if the amount paid by the insurer to the assured had equaled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within the reasons of the rule itself, as expounded by Butler and Mansfield in the case in Douglas above cited, and which is the foundation of the law on this subject."

In *Marine Ins. Co. v. R. R. Co.*, 41 Fed. Rep. 645, it was held under the Arkansas statute providing that "every action must be prosecuted in the name of the real party in interest," that an insurance company which has paid the insured the full value of the property destroyed may maintain an action in its own name against the wrong-doer causing the loss. Caldwell, J., said: "Under the reformed codes of procedure, the action of the insurance company in cases of this sort may be brought in the name of the insurer"; citing *Swarthout v. Chicago etc. R'y Co.*, 49 Wis. 625; *Connecticut F. Ins. Co. v. Erie R'y Co.*, 73 N. Y. 399; 29 Am. Rep. 171. "But as it is alleged in the complaint that the plaintiff has paid the insured the full value of the property destroyed, it is plain that the latter have no interest in the present controversy, and hence they are not necessary parties." The opinion is, however, expressed in that case, if the value of the property destroyed exceeds the insurance money paid, that the insurer might join or be joined with the owner in the action to recover for its loss, and would not be required, as held by Judge Dillon, *supra*, in such case, to prosecute the action in the name of the insured. A like view was sustained in *Crandall v. Goodrich Transp. Co.*, 16 Fed. Rep. 75, where Dyer, J., held that in an action to recover the value of a building destroyed by a fire caused by the alleged negligence of the defendant, the owner of the building and an insurance company that has paid the amount of the insurance of such building and taken an assignment of the claim from the owner to that extent, may join as parties to the action when the value of the house exceeds the amount for which it was insured. In *Swarthout v. Chicago etc. R'y Co.*, 49 Wis. 625, several insurance companies united with Swarthout, to whom they had paid the amount of their policies for property destroyed by the negligence of the defendant, in an action to recover for the value of such property. The defendant demurred, on the ground that the plaintiffs could not sue in one action, but each must sue separately. The demurrer was overruled, and the correctness of this ruling was the subject of the controversy. The court says: "It is said, if the defendant is liable at all, it is separately and distinctly liable to each insurance company to the amount paid on its policy. But it seems to us that it would be an intolerable rule to allow each insurance company to bring a separate suit. The railroad company might well say, were this attempted: The claim is indivisible; there is but

one wrongful act complained of, one loss, and one liability. It might well insist that the whole matter should be litigated in one action. And what objection there can be to allowing the owner to unite with the insurance companies in bringing one action to determine the liability of the defendant, we fail to perceive. Under the old practice, the action would probably have been brought in the name of the assured for the benefit of all concerned; but the code requires the action to be brought in the name of the real party in interest. Now, it appears that Swarthout has made an assignment in writing to each insurance company of a part of his claim against the railroad company for the alleged wrongful destruction of his property. It is obvious, if one of the insurance companies may bring a separate suit for the amount of its claim, each may; and as the aggregate amount of the policies falls short of the actual loss, Swarthout may sue for the balance. As we have said, a rule of law which would allow this to be done would operate most oppressively upon the railroad companies. For a single wrongful act, which gave rise to but one liability, it might be harassed with a dozen different actions." In a later case, *Pratt v. Radford*, 52 Wis. 118, the court, after citing the section of their statute which provides that "every action must be prosecuted in the name of the real party in interest," and the further section that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint," says: "Under the statutes above cited, the insurance companies could maintain an action against such wrong-doer in their own names, or be joined with the insured as plaintiff in such action. . . . Where the common-law procedure prevails, the action of the insurance companies would necessarily be brought in the name of the insured. It could be so brought without his consent, and he would have no control over it. But under our code of procedure, the companies would sue in their own names, — joining the insured as plaintiff, or making him defendant, according to the exigencies of the case."

It would appear, then, from these last cases, that where the property is insured for less than its value, and is destroyed by the negligence of a third party, the insurance companies who have paid the owner the insurance money must be joined with

him in an action to recover damages for the destruction of such property, and that upon a refusal of such parties to join as plaintiffs, they must be made defendants. The action, though, would be brought in their own name, joining the insured as plaintiff, or making him defendant, according as he stood related to the facts. From all this, the conclusion results that where the wrongful act is single and indivisible, there can be but one liability or cause of action. Since the code, the cause of action remains as before, single and indivisible, and the insurer acquires only a right or interest with the owner of the property in the cause of action, or liability, and not a new and separate cause of action. He cannot, therefore, sue in his own name alone, in any case, under the code, except where the amount paid by him has exceeded or equaled the value of the property destroyed, and no interest remains in the owner. When the amount of the insurance money paid is less than the value of the property destroyed by the negligent act, all the authorities agree that the insurer must either sue in the name of the insured or join with him in bringing an action against the wrong-doer. None allows that in such case he can sue in his own name alone, for the reason that the wrongful act is single and indivisible, and gives rise to but one liability or cause of action. In that cause of action he acquires a joint right with the owner therein, and not a new and separate right of action, and therefore must prosecute it jointly with him. They have a joint interest in a single liability, and, united, are the real parties in interest. Now, the facts disclosed by this record concede that the property destroyed by the wrongful act of the defendant greatly exceeded in value the amount of the insurance money paid by the plaintiff. To the extent of that payment, the plaintiff became subrogated to the right of the owner in the property, but the cause of action remained single and indivisible, and the plaintiff acquired only a joint right with the owner therein, and not a new and independent right of action, and could not therefore prosecute the action in his own and separate right. Yet this is exactly what the plaintiff has done, and claims it has a right to do. If this were so, it would establish an intolerable rule, and expose the defendant to be harassed by a dozen different actions, which, it seems to us, would be contrary to legal principles, and be productive of mischief and oppression.

The judgment must be affirmed.



**FIRE INSURANCE—SUBROGATION.**—After payment of loss by an insurance company, it is subrogated to the rights of the assured against third persons: Note to *Rockingham etc. Ins. Co. v. Bosher*, 63 Am. Dec. 621; note to *Etina F. Ins. Co. v. Tyler*, 30 Am. Dec. 102.

In *Fagerweather v. Phenix Ins. Co.*, 118 N. Y. 324, where plaintiff shipped a cargo under a bill of lading which stipulated that the carrier should have the benefit of any insurance upon the cargo, and the cargo having suffered injury through the carrier's negligence, plaintiff sued upon a policy issued by defendant, which provided that in case of loss the insurance company should be subrogated to the rights of the plaintiff against carriers of such insured cargo not exceeding the amount paid by the company, and that plaintiff should make no contract whereby this right against a carrier would be cut off, the court decided that the stipulation in the bill of lading cut off the insurance company's right to be subrogated to the rights of the owner as against the carrier.

# CASES

IN THE

# SUPREME COURT

OF

## PENNSYLVANIA.

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### ROSS v. WALKER.

[129 PENNSYLVANIA STATE, 42.]

**MASTER AND SERVANT — DUTY OF MASTER TO SERVANT.** — An employer must provide his laborers with a suitable place to work, with suitable tools and machinery to use, with suitable materials, and with reasonably competent fellow-laborers with whom to work. If they are young or without experience in the use of tools or machinery, it is his duty to see that they are instructed in their use, and warned of such dangers as are peculiar thereto.

**MASTER AND SERVANT. — VICE-PRINCIPAL,** so long as he acts in discharge of the duties which the principal owes to his employees, represents the principal, so that his act is the act of the principal. Beyond this he acts only as a workman, and not as a vice-principal.

**MASTER AND SERVANT — DUTY OF SERVANT.** — After workmen have been employed, provided with tools and materials, and have actually entered upon the work, each is bound to exercise reasonable care, diligence, and skill in its performance. Each is also bound to consider and co-operate with his fellow-workmen to promote the success of the work in which they are all engaged, and failing to do this, and receiving injury by the act or negligence of his fellow-workman, he must look to him and not to the employer for compensation.

**MASTER AND SERVANT — SERVANT, WHEN MUST EXERCISE JUDGMENT.** — When a master has performed all duties required of him towards his employees, including the selection of a competent foreman and ample material, he does not insure them against each other, nor is he bound to supervise and direct every detail of their labor. They must exercise their own judgment in the selection of material out of the mass furnished them, and as to the manner of handling it, so as to ascertain the sufficiency and stability of any scaffolding they erect for themselves, and the amount of burden to be put upon such structures.

**MASTER AND SERVANT — DUTY OF SERVANT — FOREMAN, WHEN FELLOW-SERVANT.** — When a master has performed all duties required of him towards

his employees, including the selection of a competent foreman and ample material, it is not his duty to supervise the selection of every bit of material for every purpose. The foreman and his fellow-workmen must judge of the suitability of the material used for the purposes to which it is put, and their error of judgment or careless discharge of such duty is their fault, and not that of the master. In such case the foreman is a fellow-servant, though he has entire control of the work, selected the material used; and had power to employ or discharge his fellow-workmen.

*James H. Reed and P. C. Knox*, for the appellant.

*John S. Ferguson and J. Charles Dicken*, for the appellees.

WILLIAMS, J. Walker, the defendant in this action, was engaged in erecting an iron bridge. Duffey was his foreman; Ross was a laborer, employed, with many others, in building the bridge. He was hurt while so employed, by falling from a scaffold in consequence of the breaking of a stick of timber which supported it. The scaffold was built by the workmen, as it was needed to support the iron-work while it was being put in place in the erection of the bridge. This action was brought to recover damages for the injury so sustained, and the theory of the plaintiff was, that the use of the timber that broke was due to Duffey's negligence, for which Walker was liable, because Duffey represented him and was his vice-principal. The defendant, admitting that Duffey was his foreman, denied that he was liable for the negligence of his foreman in the discharge of his duty to his fellow-workmen. By their fifth point, the defendant's counsel asked the court to instruct the jury, if they found the defendant put the work in charge of a competent foreman, and provided suitable materials for the scaffolding in sufficient quantity, then he was guilty of no negligence, and the verdict must be in his favor. The learned judge refused the instruction asked for, and went on to say that "if Duffey was in the entire charge and control of the work of erecting the bridge, determining what materials were to be used for the scaffolding, employing and discharging men, and directing where and what materials were to be used, he was acting for Mr. Walker as vice-principal, and his negligence would be that of the defendant." The correctness of this definition of a vice-principal is the question raised by the several assignments of error.

Before considering that question, it is important to recall the position and duties of the principal; for these cannot be extended or increased by the circumstance that they are per-

formed through the agency of another person. They may be stated as follows: It is the duty of an employer to provide his laborers with a suitable place to work, with suitable tools and machinery to use, with suitable materials, and with reasonably competent fellow-laborers with whom to work. If they are young or without experience in the use of the tools or machinery they are to handle, it is his duty to see that they are instructed in these particulars, and warned of such dangers as are peculiar to the use and care of the machinery with which their labor brings them in contact. Among the more recent of our cases, in which the duties of an employer are stated and applied, are *Payne v. Reese*, 100 Pa. St. 301; *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 827.

If the principal be a corporation, or be unable for any reason to discharge these obligations in person, they must be discharged through an officer, agent, or foreman. The person who is thus put in the place of the principal, to perform for him the duties which the law imposes, is a vice-principal, and *quoad hoc* represents the principal, so that his act is the act of the principal. This is true, however, only when and so long as his acts are in discharge of the duties which the principal owes to his employees. Beyond this line he acts as a workman, and not as vice-principal. After the workmen have been employed, provided with tools and materials, and the work is actually entered upon, each workman is bound by the nature and terms of service to exercise reasonable care, diligence, and skill in the performance of the work he has undertaken. He is also bound to consider and co-operate with his fellow-workmen with a view to promote the success of the industry or undertaking in which they are all engaged. He is as much bound to discharge the duty which the law casts upon him as is his employer. His failure to do what he is thus bound to do is a breach of duty towards his employer and his fellow-workmen, for which he is legally liable. For this reason the courts have uniformly held that a workman who has been injured by the act or negligence of his fellow-workman must look for his compensation to him who was the author of the wrong, and not to their common employer.

The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor. They must exercise their own senses in the selection of material out of the mass provided for them; they must use their own judgments as to the manner of handling

it, as to the sufficiency and stability of the scaffolding they erect for themselves, and the amount of burden to be put upon such structures. No employer could bear the burden of legal responsibility for every blunder or neglect on the part of each and all of his employees. The fact that one employee is more skillful than another, or has had greater experience and is so deferred to by others, does not change his relation to his employer or to his fellows. Nor does a difference in rank or grade of service change the rule. When the character of the business requires it, the master is as much bound to provide his workmen with a reasonably competent foreman as to provide them with tools; but in either case his liability ceases when he has made a suitable selection. He is neither bound to provide the best tools and machinery, nor the highest grade of skill in his foreman; but he is bound to provide that which is reasonably safe and sufficient in both cases, and having so done, he has discharged his duty. What remains to be done is, that each workman, whatever his rank or skill or experience, shall, with reasonable diligence and intelligence, discharge his duty towards his employer and his fellows.

It is thus apparent that, whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is, whether the negligence complained of relates to anything which it was the duty of the principal to do. If it does, then the principal is liable; for he must see at his peril that his own obligations to his workmen are properly discharged. If it does not, he is not liable; for all his workmen are liable to each other for the consequences of their negligence, respectively, and he does not insure them against each other by the mere fact of employing them. These general principles are stated and illustrated in the recent work of McKinney on Fellow-servants, 134-138. They are also applied in a multitude of cases decided by this court, among which are *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Mullan v. Philadelphia etc. Steamship Co.*, 78 Pa. St. 25; 21 Am. Rep. 2; *Pennsylvania etc. R. R. Co. v. Mason*, 109 Pa. St. 296; *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Bier v. Standard Mfg. Co.*, 130 Pa. St. 446.

It now remains to apply the rule just stated to the instruction complained of. It was the duty of Walker, as employer or principal, to provide the men employed to build this bridge with suitable machinery and appliances; to furnish materials

sufficient in quantity and suitable in character; to employ men who were reasonably competent to do the work for which they were wanted; and to give them the benefit of the services of a reasonably competent foreman. All this, as we understand the evidence, was done. If so, the employer had filled the measure of his legal liability to his workmen. For an error in judgment, or for a neglect of duty on the part of any one of his employees, from the foreman down to the humblest unskilled laborer, he was not liable. It was not material to this inquiry to know whether "Duffey had entire charge and control of the work" as a foreman, or not; nor to know whether he selected from the mass furnished by the employer the materials to be used for any particular purpose, or not; nor whether he hired and discharged men, or not. The inquiry is, Was it the employer's duty, after having provided materials ample in quantity and quality, to supervise the selection of every stick out of the mass for every purpose? To state this question is to answer it. This was not his duty, and for that reason, Duffey, if he did select the timber, which is more than doubtful under the testimony, did not represent Walker as a vice-principal in such selection. He and his fellow-workmen were to judge of the suitability of the pieces of timber they used for the uses to which they put them, and their error in judgment, or their careless discharge of this duty, was their fault or failure, and not that of their employer. He had discharged his duty when he furnished an abundance of materials from which they could select what was needed. The actual selection out of this stock, of the sticks needed from time to time, was not his duty, but that of the workmen themselves. If there was a visible defect in a stick, common prudence and common care on their part would have rejected it, and supplied its place with another out of the stock at their command.

The learned judge seems to have had the true rule in his mind, but in the hurry of the trial he certainly failed to give it clear and adequate expression, and for this reason the assignments of error must be sustained.

The judgment is reversed.

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**MASTER AND SERVANT — MASTER'S DUTY TO FURNISH SAFE TOOLS, ETC. —** A master must furnish safe tools, machinery, appliances, and a suitable place in which his servants can work: *Sampson Mfg. Co. v. Schaad*, 15 Col. 197; *Pierce v. Atlanta Cotton Mills*, 79 Ga. 782; *Louisville etc. Ry Co. v. Graham*, 124 Ind. 89; *Dobbins v. Brown*, 119 N. Y. 189; *Kram v. Long Island*

*R'y Co.*, 123 N. Y. 1; 20 Am. St. Rep. 716, and note; *Nadas v. White River L. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note; *Chairein v. Western Union Tel. Co.*, 40 La. Ann. 178. But he is not required to furnish the safest and newest devices and appliances: *Augerstein v. Jones*, 139 Pa. St. 183, post, p. 174, and note; *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note; *Kern v. De Castro etc. Co.*, 125 N. Y. 50. That an appliance is new and demands peculiar management on the part of the servants who use it is no reason why the master should not introduce it: *Gulf etc. R'y Co. v. Williams*, 72 Tex. 159.

**MASTER AND SERVANT — DUTY OF MASTER TO WARN OR INSTRUCT MINOR EMPLOYEES.** — The master must see that young and inexperienced servants are instructed in the use of tools and appliances which they are compelled to use: *Cvriack v. Merchants' W. Co.*, 151 Mass. 152; 21 Am. St. Rep. 438, and note. Yet an infant employee is as responsible as an adult for his own protection, so far as known and obvious dangers are concerned: *McCarragher v. Rogers*, 120 N. Y. 526; *Buckley v. Gutta Percha etc. Co.*, 113 N. Y. 540; *Gillen v. Rowley*, 134 Pa. St. 209; *Coullard v. Tecumseh Mills*, 151 Mass. 85. It is a question for the jury to decide whether a minor employee is of such age as to comprehend the dangers of his employment, and if not, whether his master has properly instructed him: *Nelson v. Marinette etc. Co.*, 75 Wis. 579.

**MASTER AND SERVANT — VICE-PRINCIPALS — FELLOW-SERVANTS.** — A vice-principal represents his master so long as he discharges the duties which the master owes to his servants, and to that extent the master is responsible to his servants for the acts of such vice-principal: *Haley v. Western T. Co.*, 76 Wis. 344; *Louisville etc. R'y Co. v. Graham*, 124 Ind. 89; *Town v. Railroad Co.*, 84 Mich. 214; *Galveston Oil Co. v. Thompson*, 76 Tex. 235; *Brown v. Gilchrist*, 89 Mich. 56; 29 Am. St. Rep. 496, and note; *Nadas v. White River L. Co.*, 76 Wis. 120; 20 Am. St. Rep. 29, and note. Beyond such acts, the vice-principal is a fellow-servant, for whose acts resulting in injury to other servants the master is not responsible: *Galveston etc. R'y Co. v. Farmer*, 73 Tex. 85; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227; *Chicago etc. R. R. Co. v. Sullivan*, 27 Neb. 673; *Johnson v. Ashland Water Co.*, 77 Wis. 51.

**MASTER AND SERVANT — FELLOW-SERVANTS — MASTER'S LIABILITY.** — A master is not liable for injuries suffered by a servant through the negligence of a fellow-servant, unless he was negligent in the selection of such fellow-servant: *Congrave v. Southern P. R. R. Co.*, 88 Cal. 360; *Smith v. Sibley Mfg. Co.*, 85 Ga. 333; *McGovern v. Columbus Mfg. Co.*, 80 Ga. 227; *Georgia R. R. etc. Co. v. Brown*, 86 Ga. 320; *Whitmore v. Boston etc. R'y Co.*, 150 Mass. 477; *Bergstrom v. Staples*, 82 Mich. 654; *Hammond v. Chicago etc. R'y Co.*, 83 Mich. 336; *Smith v. St. Paul etc. R. R. Co.*, 44 Minn. 17; *Johnson v. St. Paul etc. R. R. Co.*, 43 Minn. 222; *Arnold v. President etc.*, 125 N. Y. 15; *Filbert v. President etc.*, 131 N. Y. 207; *Hague v. Cape Fear etc. R'y Co.*, 106 N. C. 537; *Duffy v. Oliver*, 131 Pa. St. 203; *Allegheny H. Co. v. Rohan*, 118 Pa. St. 223; *St. Louis etc. R'y Co. v. Welch*, 72 Tex. 298. This rule, however, does not apply unless the servants are engaged in the same general employment: *Sadowski v. Michigan C. Co.*, 84 Mich. 100; *Nelson v. Chicago etc. R'y Co.*, 77 Iowa, 465. A servant, to recover for an injury received through the negligence of a fellow-servant, must show that he was in the exercise of ordinary care, and did nothing to contribute to his own injury: *Central R. R. etc. Co. v. Lanier*, 83 Ga. 587; *Audin etc. R'y Co. v. Beatty*, 73 Tex. 593; *Parker v. Georgia P.*

*Ky Co.*, 83 Ga. 539. There is no difference between an act of a fellow-servant which causes an injury, and a command which produces the same result. *Gulf etc. Ry Co. v. Blohm*, 72 Tex. 637; *Roul v. East Tennessee etc. Ry Co.*, 85 Ga. 197.

## IRON CITY NATIONAL BANK v. McCORD.

[189 PENNSYLVANIA STATE, 52.]

**NEGOTIABLE INSTRUMENTS — CONDITIONS DESTROYING NEGOTIABILITY.** — Anything written or printed on a negotiable instrument prior to issuance by the maker, relating to the subject-matter thereof, and tending to restrain or qualify it, is regarded as part of the contract; and if by such language payment is not necessarily to be made at all events, and for the full sum, at a time certain, subject to no contingency, its negotiability is destroyed.

**NEGOTIABLE INSTRUMENTS — ORDER ON BANK — CONDITIONS DESTROYING NEGOTIABILITY.** — An order drawn by a depositor on a bank, to pay to the payee named therein, or order, a certain sum nine weeks from date, and providing on its face that he or his transferee must present to the bank, with the order, a notice ticket, and also produce at or before the time of payment the drawer's deposit-book, is non-negotiable, and shows on its face that it is not a regular commercial check, and is not intended to operate as such, but was drawn on a specially deposited fund, held subject to certain rules and regulations requiring certain things to be done before payment could be required.

*George P. Graver and D. T. Watson*, for the appellant.

*Levi Bird Duff*, for the appellee.

STERRETT, J. This action of *assumpsit* was brought by the Iron City National Bank, indorsee and holder, against Mrs. McCord, drawer of an order in the following form: —

|                                                        |                                                                           |                   |                                         |                                                    |
|--------------------------------------------------------|---------------------------------------------------------------------------|-------------------|-----------------------------------------|----------------------------------------------------|
| No. 12, FOURTH AVENUE.                                 | RETURN NOTICE TICKET WITH THIS ORDER.                                     |                   |                                         | Open daily from 9 o'clock A. M. to 3 o'clock P. M. |
|                                                        | No. of Book, 44,684. \$900. <sup>00</sup> / <sub>100</sub> Nov. 30, 1887. |                   |                                         |                                                    |
|                                                        | <b>DOLLAR SAVINGS BANK,</b>                                               |                   |                                         |                                                    |
|                                                        | (Of Pittsburgh.)                                                          |                   |                                         |                                                    |
|                                                        | Nine weeks from date, or Feb. 1, 1888,                                    |                   |                                         |                                                    |
|                                                        | Pay to W. J. Quinn or order..... or Bearer,                               |                   |                                         |                                                    |
|                                                        | Nine hundred..... <sup>00</sup> / <sub>100</sub> Dollars.                 |                   |                                         |                                                    |
|                                                        | WITNESS:                                                                  |                   | Sign on line below, First name in full. |                                                    |
| J. P. McCORD.                                          |                                                                           | MARTHA J. McCORD. |                                         |                                                    |
| DEPOSIT BOOK MUST BE AT BANK BEFORE MONEY CAN BE PAID. |                                                                           |                   |                                         |                                                    |

Indorsed: W. J. QUINN.



It appears that W. J. Quinn, the payee and indorser of the order, obtained the same from the defendant in payment of the balance claimed to be due him as contractor for the erection of buildings on her separate estate, by assuring her that all claims of material-men and subcontractors were fully paid, and no liens could be filed against the buildings. That representation proved to be untrue, and liens amounting, with costs, to \$444.90 were subsequently filed. In view of the facts, it cannot be doubted that, as between Quinn and Mrs. McCord, the latter had a valid defense to the payment of the order, at least to the extent of the liens; and unless the order is negotiable in the sense of the law merchant, the plaintiff, as Quinn's indorsee, is in no better position. The learned president of the common pleas must have been of that opinion, because he refused to charge, "that, under all the evidence, the verdict of the jury must be for the plaintiff," and instructed them that if they believed the evidence, the defendant had a valid defense to the order, in the hands of the bank, to the extent of the liens and costs thereon. The verdict in favor of the plaintiff for \$481.10 was evidently the result of that instruction, as applied to the facts found by the jury. The main question, therefore, is, whether, in the legal sense, the order in suit is negotiable. If it is not, there was no error in refusing to charge as requested by plaintiff, and in affirming defendant's second point.

While the direction is to "pay to W. J. Quinn or order nine hundred dollars in nine weeks from date, or February 1, 1888," there is enough on the face of the order to show that, in the commercial sense, it was not a regular check, and was not intended to operate as such. It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank, subject to certain rules and regulations in force between it and the depositor, requiring certain things to be done before payment could be required, viz., previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit-book at the bank, so that the payment might be entered thereon.

Section 8 of the by-laws, given in evidence, requires: "When money is to be drawn out, the book must be brought to the office to have payment entered thereon. Depositors must take out the money themselves, except in case of sickness or other infirmity, or absence from the city, it may be paid to their

order, properly witnessed, accompanied by the book. Blank orders will be furnished at the office of the corporation." One of those blanks appears to have been used for the order sued on in this case, substituting the word "order" for "bearer." According to the testimony of plaintiff's cashier, his attention was called to the prerequisites to payment noted on the face of the order, and it must therefore be presumed that he knew the order "to pay in nine weeks," etc., was restricted or qualified by the provisions contained in the by-law, requiring notice of intention to draw, return of notice ticket with the order, and at the same time presentation of the deposit-book. The effect of these requirements was to restrain or qualify the otherwise general operation of the order.

It is well settled that anything written or printed on a negotiable instrument prior to its issuance by the maker, relating to the subject-matter of the instrument, and tending to restrain or qualify it, must be regarded as part of the contract intended to be evidenced thereby: *Costello v. Crowell*, 127 Mass. 293; 34 Am. Rep. 367, and cases there cited; *Henry v. Colman*, 5 Vt. 403; *Fletcher v. Blodgett*, 16 Vt. 26; 42 Am. Dec. 487; *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Johnson v. Heagen*, 23 Me. 329. In *Costello v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367, the words "given as collateral security with agreement," written on the margin of a promissory note, were held to destroy its negotiability. Speaking for the court in that case, Mr. Justice Lord said: "It is settled, by an uninterrupted series of decisions, that any language put upon any portion of the face or back of a promissory note by the maker, before delivery, is part of the contract; and if by any such language the payment of it is not necessarily to be made, at all events and of the full sum, in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable." Our own cases, among which are *Overton v. Tyler*, 3 Pa. St. 346, 45 Am. Dec. 645, *Sweeney v. Thickstun*, 77 Pa. St. 181, *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201, *Citizens' Nat. Bank v. Piollet*, 126 Pa. St. 194, 12 Am. St. Rep. 860, in effect recognize the same principle. In *Jones v. Fales*, 4 Mass. 245, the words "foreign bills," written at the foot of a promissory note, were held to be part of the note itself, and rendered it non-negotiable. The same effect was given to the words "in facilities," shown to mean a class of bank notes then worth less than par: *Springfield Bank v. Merrick*, 14 Mass. 322.

The principle recognized in these and other cases is un-

doubtedly correct, in that it is necessary to preserve the integrity of negotiable instruments. Applying it to the instrument in suit, it is, in substance, merely an order on the Dollar Savings Bank to pay W. J. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1, 1888, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce, at and before the time of payment, the drawer's deposit-book. As already remarked, these are undoubtedly prerequisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also prerequisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply. As was said in *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency. It would be a mere affectation of learning to cite the elementary treatises and the decided cases which have established this principle. It is very important to the commercial community that it should be maintained in all its rigor." If this is not done, such paper would soon cease to be a "courier without luggage," and become loaded down with conditions, contingencies, and all sorts of *impedimenta*, so that its usefulness would be greatly impaired, if not entirely destroyed.

Technically, the plaintiff was not entitled to recover; but by treating the record as amended, a verdict was rendered and judgment entered thereon for all that could have been recovered if Quinn had been made the legal plaintiff. Substantial justice has thus been done, and there is no reason why the judgment should not be affirmed.

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NEGOTIABLE INSTRUMENTS—CONDITIONS AFFECTING NEGOTIABILITY.—Commercial paper, to be negotiable, must be certain and unconditional: *Jennings v. First Nat. Bank*, 18 Cal. 417; 16 Am. St. Rep. 210, and note. A note payable to certain specified payees in certain proportions, without specifying that it is payable to their order or bearer, is not negotiable: *Graves v. Mining Co.*, 81 Cal. 304. A note containing a stipulation for payment of attorney's fees is not an unconditional note, and therefore non-negotiable: *Savings Bank v. Stretcher*, 28 S. C. 545; *Hatcher v. National Bank*, 79 Ga. 543; *Wright v. Traver*, 73 Mich. 493; *Altman v. Fowler*, 70 Mich. 57. A note payable "on or before" a certain date is not for that reason non-negotiable: *First Nat. Bank etc. v. Skeen*, 101 Mo. 683. The certainty requisite to the negotiability of an instrument must continue until the obligation is discharged, and any provision which removes that certainty prevents the negotiation of the paper at all: *Altman v. Bittershofer*, 68 Mich. 267; 13 Am. St. Rep. 341, and note.

## COMMONWEALTH v. MILLER.

[130 PENNSYLVANIA STATE, 77.]

**NUISANCE — FACTS WHICH MAY CONSTITUTE DEFENSE.** — When the question to be determined is whether or not a certain business constitutes a nuisance, the character of the location where the business was established, the nature and importance of such business, the length of time it has been in operation, the capital invested, and its influence upon the growth and prosperity of the community, are proper facts to be considered by the jury, and may constitute a defense, though they will not justify the maintenance of a nuisance after its existence is established.

**CRIMINAL LAW — REASONABLE DOUBT.** — A doubt fairly derived from the evidence, that would cause one to pause and hesitate before acting upon any important transaction in life, is a reasonable doubt. It need not be such a doubt as would control a person, in order to be reasonable.

**NUISANCE — VIEW OF PREMISES AND COMMENT OF COUNSEL WITHIN COURT'S DISCRETION.** — In an action to determine whether or not a certain business is a nuisance, the granting of a request that the jury be allowed to view the alleged nuisance, as well as the right of counsel to comment on opposing counsel's failure or refusal to join in such request, are matters within the discretion of the trial court, and its action will not be disturbed, unless a clear abuse of discretion is shown.

*S. Schoyer, Jr., George Shiras, Jr., and S. B. Schoyer, for the appellants.*

*John S. Ferguson, George Elphinstone, and W. B. Rodgers, for the appellee.*

**WILLIAMS, J.** The defendants own and operate a refinery where crude petroleum and its products are prepared for market. There are four acres within the inclosure fronting on the Ohio River. The Pittsburgh and Western railroad passes in front of it, along the river's edge. The Cleveland and Pittsburgh railroad runs upon the street directly in the rear. The city of Allegheny, like its sister city, Pittsburgh, owes its growth and prosperity to the extent of its manufacturing interests, and the river front is almost wholly given over to these great industries. The indictment charges that the defendant's refinery is a public and common nuisance because of the emission therefrom of certain noxious and offensive smells and vapors, and because the oils and gases stored and used therein are inflammable, explosive, and dangerous. The jury, under the instructions of the court, found the defendants guilty, and the sentence which has been pronounced requires the abatement or destruction of a plant in which some three hundred thousand dollars are said to be invested, and which gives employment to seventy-five men. The

assignments of error are quite numerous, but the important questions raised are few.

The first four assignments, the sixth, ninth, tenth, and sixteenth, may be considered together, as they relate more or less directly to the same subject. The learned judge had his attention directed by the written points to the definition of a public nuisance, and to the circumstances under which the defendants' refinery had been established and maintained for many years; and he instructed the jury that the character of the location where the refinery was established, the nature and importance of the business, the length of time it had been in operation, the capital invested, and the influence of the business upon the growth and prosperity of the community were no defense to an indictment for nuisance. Among other expressions used by him are the following: "It is no defense to an indictment for a common nuisance that the business complained of has been in operation many years." "I do not think the size of an establishment makes any difference." And again: "Neither is it a defense in any measure that the business is a useful one," etc. If it had been an admitted or an established fact that the business of the defendants was a common nuisance, and they had attempted to justify its maintenance, these instructions would have been appropriate; but the question before the jury was, whether the business was a nuisance. The decision of that question depended upon a knowledge of all the circumstances peculiar to the business, the place, its surroundings, and the employments of the persons in the vicinity. While no one of these, nor all together, would justify the maintenance of a nuisance, they might be sufficient, and they certainly were competent, evidence from which the jury might determine whether the defendants' refinery was a common nuisance at the place where it was located, and this was the question to be determined by the trial. They might make, therefore, or contribute to make, a defense to the indictment trying. This distinction between an effort to justify an admitted or established nuisance, and a denial that the business complained of amounts to a nuisance, was evidently in the mind of the learned judge, but in the haste that attends jury trials, he failed to place it clearly before the jury. He did say that the facts referred to had "weight, and are to be considered in determining the degree of the injury produced, and whether the effects are so annoying, so productive of inconvenience and discomfort, that it can be said to be

really so prejudicial to the public as to be a nuisance"; but following an explicit statement that these same facts were "no defense to an indictment for erecting and maintaining a nuisance," such as they were then trying, the jury was left without an adequate presentation of the defense.

That such facts are proper for consideration, and may make a defense, has been long and well settled: Wood on Nuisances, sec. 430. The same rule was applied in this state in *Huckenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669, and in *Commonwealth v. Reed*, 34 Pa. St. 275, 75 Am. Dec. 661. The character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle: *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 221. In the case last cited, Lord Cranworth referred to a case at *nisi prius*, in which he had instructed the jury to consider not only whether the quantity of smoke complained of would amount to a nuisance, considered abstractly, but "whether it is a nuisance to a person living in Shields," which was the name of the town in which the business was conducted. It was in this respect that the instructions complained of in the first, second, and third specifications were inadequate. They gave the general rule without the qualifications which the situation of the defendants' refinery entitled him to. The right to pure air is in one sense an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but in another sense it is relative, and depends upon one's surroundings. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts, by reason of noise, dust, smoke, and odors, more or less disagreeable, produced by and resulting from the business that supports the city. They can only be relieved from them by going into the open country. The defendants had a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of Allegheny as a manufacturing city, and the manner of the use of the river front for manufacturing purposes. If, looked at in this way, it is a common nuisance, it should be removed; if not, it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve.

The fifteenth assignment relates to the definition of a "rea-

sonable doubt." The learned judge said: "It is such a doubt as would influence or control you in your actions in any of the important transactions of life." He did not say that a doubt that would cause one to pause and hesitate was, if fairly derived from the evidence, a reasonable one within the meaning of the criminal law, but that it must be one that would control one's conduct in the important transactions of life. Our actions are determined by the preponderance of considerations. We doubt, hesitate, examine, balance the argument for and against the given action, and act as the preponderance indicates. A doubt that would control our actions in the important transactions of life would be one that was so strong as not to be overcome by the balancing process. Such a doubt would be practically an unconquerable one. It would lead us, not simply to refrain from acting, but to act.

The twelfth and thirteenth assignments relate to the request of the defendants that the jury be permitted to view the alleged nuisance, and see its situation and surroundings, and observe its operations, before passing upon them. This was a reasonable request, and in view of the magnitude of the interests involved, it is difficult for us to understand why it was not granted by the court. It was, however, a matter fairly within the discretion of the court, and we cannot say that it was an abuse of that power to refuse the application upon anything now before us. Much the same thing may be said of the action of the court in refusing permission to defendants' counsel to comment upon the action of the commonwealth in objecting to the proposed view of the premises. So much depends on what is said, and the connection in which it stands, that it should be a clear case of infringement upon the right of counsel to comment upon the incidents of the trial, to induce us to interfere with the discretionary control of the trial judge. It appears by the thirteenth assignment that as counsel for the defendants were addressing the jury, they proposed to comment on the action of the commonwealth's counsel in refusing to join in the request for an examination of the premises by the jury, and in objecting thereto, and that counsel for the commonwealth "objected to the propriety of such comment." The objection was sustained, and the comments were not allowed to proceed. The fact that an application was made by the defendants, objected to by the commonwealth, and denied by the court, was within the

knowledge of the jury, because it had transpired, as we understand, in their presence. It was a fact that for some purposes might properly be referred to, as an incident of the trial, by counsel, but, like other facts, it might be commented upon in an improper manner, or used for an improper purpose; and in the absence of precise information upon the subject, we must presume that the learned judge exercised a proper supervision over the argument.

We think the indictment is sufficient in form to sustain a verdict, and the verdict rendered is applicable to all the counts, and was, no doubt, so intended by the jury, but, for the reasons given, the judgment cannot be sustained.

Judgment reversed.

**NUISANCE — DEFENSES TO AN ACTION FOR.** — Carrying on an offensive or dangerous business for any number of years in a remote place does not entitle the owner to continue the same after the neighborhood is settled. Its continuance thereafter is a nuisance: *Laflin etc. Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654, and note. There can be no prescriptive right to maintain a public nuisance: *Wright v. Moore*, 38 Ala. 593; 82 Am. Dec. 731, and note; *Inhab. of Charlotte v. Pembroke etc. Works*, 82 Me. 391; *New Castle v. Raney*, 130 Pa. St. 546; *Mills v. Hall*, 9 Wend. 315; 24 Am. Dec. 160, and note. The question being whether a business carried on near the dwelling-house of the plaintiff is a nuisance, it is not a sufficient defense that the business is lawful, and the use made by the defendant of his own property reasonable: *Heribut v. McKone*, 55 Conn. 31; *Shepard v. Hill*, 151 Mass. 540; *Bohan v. Port Jervis etc. Co.*, 122 N. Y. 18.

**CRIMINAL LAW — REASONABLE DOUBT — DEFINITION OF.** — A reasonable doubt is one arising from a candid investigation of the evidence, such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate: *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147, and note. See also *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711. A reasonable doubt must be a fair one, based on reason and common sense: *People v. Cox*, 70 Mich. 247.

## AUGERSTEIN v. JONES.

[129 PENNSYLVANIA STATE, 122.]

**MASTER AND SERVANT. — DUTY ON PART OF MASTER** is to provide ordinary machinery reasonably safe for the work to be done. He need not provide such as will either insure the servant against injury, or be of the very best and newest device obtainable. If this is done, the master is not liable, though the servant is injured without fault of his own.

**MASTER AND SERVANT — MASTER'S LIABILITY IF DIFFERENT DEVICE WOULD PREVENT ACCIDENT.** — The risk to which an employer subjects his employee in the use of machinery furnished is not sufficient to impose liability upon the former, as being extraordinary in character, merely be-



cause the injury in a particular case might possibly have been prevented by adopting some different device. Mere proof of accident and such possible prevention is not the test of negligence by the master which produces legal liability.

**MASTER AND SERVANT — NEGLIGENCE — LIABILITY FOR DEFECTS IN MACHINERY.** — It is not negligence on the part of the master towards his servant if a tool or machine breaks or bursts, whether from an internal original fault, not apparent when it was first provided, or from an external apparent one, produced by time and use, not brought to the master's knowledge. These are ordinary risks of the employment assumed by the servant, and which it is his duty to report to the master.

**MASTER AND SERVANT — NEGLIGENCE — BURSTING OF MACHINERY.** — Where a servant is injured by the bursting of an emery-wheel operated by him, not shown to have been defectively constructed so as to cause the injury, the fact that the accident might have been prevented by the adoption of a different device than that in use will not charge the master with negligence.

*John D. McKennan*, for the appellants.

*A. M. Watson and James H. Porte*, for the appellee.

**GREEN, J.** The plaintiff, being in the employment of the defendants in the service of grinding boxes on an emery-wheel, was injured by the bursting of the wheel, and brought this action to recover damages for the injury. The negligence charged against the defendants as the cause of the injury, in the plaintiff's statement, was: "That said emery-wheel was placed in a plate or rest, which said plate or rest was unsafe, insecure, and dangerous to be used when said emery-wheel was in motion, of which the defendants then and there had full knowledge, and of which the plaintiff had no knowledge; that it was the duty of the said defendants to guard, fasten, secure, and protect such plate or rest, so containing said emery-wheel as aforesaid, so that the plaintiff might work thereat without danger to life or limb"; and that while the plaintiff was at work grinding boxes on the wheel it broke, and the plate or rest was thrown against the plaintiff's head, and injured him.

The learned court below put the case to the jury in this manner: "You will observe that the negligence charged here is, that this iron plate was insecure and unsafe, and that when the wheel burst it was not sufficiently secure to protect him; that if it had been sufficiently secured and fastened, he would not have been injured. That is the question you are to try. We do not try whether the machinery was properly oiled, or whether it wobbled, or how the wheel broke; because it is alleged that if this plate had been fastened with screws at the

top, as they allege it is now, this man would not have been hurt. That is the allegation. Bear that in mind, because that is what we are to try." The court then proceeded to say that, to determine the defendants' liability, the jury must find some neglect of duty in regard to the plate; that the defendants must furnish reasonably safe appliances for their employees, and if they were told that the plaintiff was an unskilled man, they must inform him of anything dangerous. The court further said: "Now, what was the duty of the defendants in this case? Emery-wheels will burst; a grindstone of any kind will burst. Everybody knows that; and it is not necessary to give proof that it may burst. But the mere bursting of a grindstone, unless there is some defect in it of which the proprietors were informed, will not enable a person to recover damages from the proprietors. If that were the law, we might as well shut up our works and go to something else. But if the accident happened by reason of any neglect on the part of the proprietors, they would be liable. In this case, if they knew that putting these bolts through, and screwing them on top of the plate, in case it did burst, would protect a man, then they were bound to do that, and that is one of the questions for you. Now, how is that? Here was a plate. If it had been secured on top with screws through it, as was done since, would that have protected this man when the stone burst? If it would, and they knew, or had reason to know, that that would be a protection, then the defendants were bound to do that much. . . . So the question here is simply this: Was it negligence on the part of the defendants not to have put these uprights through, and to have screwed them on top of the plates? and if they had done that, would that have prevented this injury? If you find that to be the case, then that would be negligence on the part of the defendants, and the plaintiff would be entitled to recover." The substantial meaning of this is, that if the accident could have been prevented by screwing down the plate, the defendants were negligent in not doing so, and the plaintiff could recover. This method of treatment makes the fact of the accident and its possible prevention the test of the negligence of the defendant which produces legal liability. It has been so many times decided, and by so many courts of last resort, that this is not the legal test of liability for negligence, especially where the plaintiff is an employee, and the action is

against his employer, that it seems a work of supererogation to cite the authorities.

This court has with frequency expressed the rule of liability in this class of cases. Thus in *Payne v. Reese*, 100 Pa. St. 806, we said, Gordon, J.: "An employer is not bound to furnish for his workmen the safest machinery nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty." The same rule was asserted and applied in *Pittsburgh etc. R'y Co. v. Sentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684. In *North. Cent. R'y Co. v. Husson*, 101 Pa. St. 7, 47 Am. Rep. 690, we said: "We cannot agree that the risk to which an employer subjects his employee suffices to impose liability upon the former, as being extraordinary in character, merely because the injury in a particular case might possibly have been prevented by some different device. Almost all accidents could be avoided, if the especial manner of their occurrence could be foreseen. . . . If the risk is an ordinary one, the employer is not liable, even if the employee did use ordinary care. In all such cases, the risk of injury is one of the hazards which the employee assumes when he engages in the service to which it is incident."

In the case of *Baker v. Allegheny R. R. Co.*, 95 Pa. St. 211, 40 Am. Rep. 634, Sharswood, C. J., in delivering the opinion of the court, said: "A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. . . . The duty which the master owes to his servants is to provide them with safe tools and machinery, where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect, which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or from an external apparent one, produced by time and use, not brought to the master's knowledge.

These are the ordinary risks of the employment which the servant takes upon himself." In *Philadelphia etc. R. R. Co. v. Keenan*, 103 Pa. St. 124, we held that a master is bound to exercise reasonable care to adopt and maintain suitable instruments and means to carry on the business in which his servants are employed, but is not required to furnish the newest or best form of instruments. In *Shaffer v. Haish*, 110 Pa. St. 575, the present chief justice said: "It was the duty of the defendants to furnish those in their employ with ordinary machinery, such as with reasonable care may be used with safety. This was the precise measure of their duty; nothing more, nothing less. They are not bound to insure against accidents. So long as leather will stretch and iron will break, accidents will occur."

In *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519, 4 Am. St. Rep. 613, we held that, to be relieved from liability for injuries received by a servant from the use of defective materials, the master is not required to supply the best materials known, or to subject such as he does supply to an analysis to determine what hazard may be incurred in their use. For injuries thus suffered by a servant, when engaged in a work and in a place not in any sense dangerous, the materials being those for a long time in common use for the purpose to which they were applied, and the work done under the direction of a competent superior, the master is not liable. In *Philadelphia etc. R. R. Co. v. Hughes*, 119 Pa. St. 301, our brother Clark said: "It was the duty of the company to exercise ordinary care in adopting, providing, and maintaining safe cars, with suitable appliances and machinery with which the plaintiff might transact the business of the company within the line of his duty; not the very best machinery which could be procured, or that which combined the latest device or improvement as a precaution against danger, but such as was reasonably safe and in common use. . . . The company does not insure the life of its employees: the servant assumes, as we have said, the ordinary risks of his employment; and if any defect in the tools or machinery placed in his hands becomes apparent in their use, it is the duty of the servant to observe and report to his employer, for the servant has means of discovering defects which the master may not possess." The same rule is repeated in *Rummell v. Dilworth*, 111 Pa. St. 343.

We have thus seen that the rule of duty on the part of the defendants was to provide ordinary machinery, such as was

reasonably safe for the work to be done, and not to provide such as would either insure the plaintiff against injury, or be of the very best and newest device attainable. If this was done, the defendants are not liable, although the plaintiff was injured without fault on his part. Instead of this rule being given to the jury, with an instruction to find whether the wheel was set in its frame in the ordinary and usual way, so as to be reasonably safe, the jury was told that if the accident could have been prevented by screwing down a heavy iron plate over the wheel, so as to avoid injury to the plaintiff, and this was not done, and the injury resulted from that cause, the plaintiff would be entitled to recover. That this was error is too plain for argument. Practically, it would require that employers should provide such machinery as would suffice to insure their employees against accidents.

If we recur to the facts, about which there is but little dispute, we find that the wheel was set in a frame, surrounded by four iron standards, upon which was placed a heavy iron plate, with a hole at each corner, half-way through the plate, into which the standards were fitted, and with an oblong hole in the center, through which the wheel projected very slightly, so that the boxes could be rested on the plate, and applied to the wheel to be ground. The plate was two and a half feet long, eighteen inches wide, and one inch thick. Its weight was not given, but it was testified to be very heavy. There was a method of lowering the plate by means of nuts or pins below the plate, so that the surface of the plate could be accommodated to the wheel as it gradually wore down, but there were no nuts or pins above the plate to fasten it down. The accident happened by the sudden bursting of the wheel while the plaintiff was at work over it, the plate being lifted up so that it struck the plaintiff on the under jaw, and broke it. There was no proof that the emery-wheel had any defect in its structure. It was a new one, that had been put in place about two or three months before the accident. It was testified that emery-wheels sometimes burst, though not frequently. Two witnesses who had worked about nine years in this shop, and knew this machine, did not mention any accident of this kind as having occurred in that time, although there were three emery-wheels in use there. One witness, Huber, who had worked there six years, testified that he had never heard of the bursting of a wheel while he was there. The bursting of this wheel was therefore a very exceptional occurrence, and

It became a matter of the highest importance to the plaintiff's case to prove that the structure of the machine was in some manner defective, in order to bring home a charge of culpable negligence to the defendants. The vital question was, whether this machine was built or set up in the usual and ordinary manner in which machines of that kind were built; and if not, then in what respect, if any, was it defectively built? and did such defect of structure cause the injury to the plaintiff?

The writer has read over the testimony twice, patiently and carefully, and he is obliged to say that there is not a scrap of testimony on this subject. Not a witness was asked a single question as to what was the usual and ordinary way of constructing such machines, or whether this one was built in any respect differently from other machines of this kind. There is absolutely no information on that subject to be found anywhere on this record, and yet it is of the very essence of the plaintiff's case. Judged by the test of experience, the inference is, that it was adequately built, as no accident had occurred on it during nine years of constant use. Where, then, is the evidence—any evidence—of negligence in the structure of the machine? There is none. The plaintiff endeavored to make out his case by proving that if the plate had been bolted down fast the accident might not have happened; but even this attempt was not successful, as most of his witnesses refused to say that the plate would have remained fast if the wheel had broken. But that kind of proof, even if made, is not the test of liability. It only tends to prove that the particular accident might have been prevented if the particular precaution had been taken; and that goes for nothing, in considering the question of legal liability in a charge of negligence. For aught that appears upon this record, this machine was built in precise accord with the usual and customary mode of building such machines. There is no proof that an omission to fasten the plate down with screws and bolts was any departure from the ordinary mode of building such machines, and therefore there was no evidence to support an allegation of negligence in the structure of the machine. There was a little testimony to the effect that the wheel sometimes wobbled in its movement, though both the plaintiff and some other of his witnesses who worked at it testified they did not notice it; but even if this were true, it was a defect of which it was the duty of the workmen who could see it to notify the defendants, before any liability could

attack on that ground. Upon the whole case, we are quite clear that the court was in error in presenting to the jury an erroneous rule or test of liability, and also in submitting a question of fact in support of which there was no sufficient testimony before them.

We think the witness Huber had sufficient expert knowledge to justify the admission of the testimony rejected under the first and second assignments, but we find no exception in the printed record to the rulings of the court, and therefore these assignments cannot be sustained. The third and fourth assignments are in violation of the rule of court, in not setting out the testimony in question, and must be dismissed. The fifth assignment is without merit. But the sixth assignment is sustained, and on that the judgment is reversed.

Judgment reversed.

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THE CASE OF *Simpson v. Pittsburgh Locomotive Works*, 139 Pa. St. 245, was similar in all respects to the principal case. It was an action against the defendant to recover damages for negligently causing the death of plaintiff's husband, who was killed by the bursting of an emery-wheel which he was operating. A judgment of nonsuit was granted, on the ground that in the absence of evidence showing what caused the wheel to burst, or that it was improperly constructed and set up, or that there was any defect about it which was known, or could have been known by the exercise of reasonable diligence on the part of the defendant company, it was not guilty of negligence, and plaintiff was not entitled to recover. This judgment was affirmed on appeal.

In the subsequent case of *Ford v. Anderson*, 139 Pa. St. 261, the fact-were, that the plaintiff, a boy about fourteen years of age, had been employed for about ten days in defendant's steel-works in handling a lever which controlled a car-spring machine. He was without previous experience in the work, and the machine was run by a rapidly revolving belt which approached to within a few inches of the lever when the latter was pushed back to stop the machine. On the day of the accident, while pushing the lever back, he was in some way caught and thrown against the machine, his arm broken, and other injuries suffered. He claimed damages on the ground of defendant's negligence in having the belt mentioned uncovered, and so near the operator as to be dangerous, but the proof failed to show that it was usual to have such belts covered, or that the belt in question was unusually short, or that it was practicable to make it longer in that place, or that the belt actually caused the accident. The trial court refused to instruct the jury that, under the evidence, the verdict must be for the defendant. The appellate court reversed the judgment, on the ground that plaintiff's case was fatally defective in failing to show, by a fair preponderance of evidence, that his injuries were caused by defendant's negligence as alleged; that the ground of a master's liability for injury to an employee while operating machinery is negligence, and not danger; and that the test of negligence in such case is the ordinary usage of the business; and in the absence of proof that the machinery was negligently constructed, and of the manner in which

the accident occurred, the plaintiff is not entitled to recover, and the jury should be so instructed.

**MASTER AND SERVANT. — MASTER'S DUTY TO PROVIDE SAFE MACHINERY, TOOLS, ETC.:** See *Ross v. Walker*, 139 Pa. St. 42, *ante*, p. 160, and *note*.

**MASTER AND SERVANT — ASSUMPTION OF RISKS BY SERVANT.** — The servant, by entering his master's employment, assumes all known and obvious risks, as well as such risks as are ordinarily incident to the service: *East Tennessee etc. R'y Co. v. Suddeth*, 86 Ga. 388; *Schubbe v. Central etc. Bkg. Co.*, 85 Ga. 592; *McNally v. Savannah etc. R'y Co.*, 86 Ga. 262; *Central etc. Bkg. Co. v. Sims*, 80 Ga. 750; *Prather v. Richmond etc. R. R. Co.*, 80 Ga. 427; *Union P. R'y Co. v. Bates*, 37 Kan. 715; *Ray v. Jeffries*, 86 Ky. 367; *Vincennes etc. Co. v. White*, 124 Ind. 376; *Griffin v. Ohio etc. R'y Co.*, 124 Ind. 326; *Yates v. McCullough*, 69 Md. 370; *Boyle v. New York etc. R. R. Co.*, 151 Mass. 102; *Larson v. St. Paul etc. R'y Co.*, 43 Minn. 423; *Jacobs v. Lake Shore etc. R'y Co.*, 84 Mich. 299; *Eddy v. Aurora I. Works*, 81 Mich. 548; *Fox v. Color Works*, 84 Mich. 676; *Patnode v. Harter*, 20 Nev. 303; *Nash v. Nashua etc. Co.*, 62 N. H. 406; *McGovern v. Central etc. R. R. Co.*, 123 N. Y. 281; *Buckley v. Gutta Percha etc. Co.*, 113 N. Y. 540; *McCarragher v. Rogers*, 120 N. Y. 526; *Burrell v. Gowen*, 134 Pa. St. 527; *Allegheny H. Co. v. Rohan*, 118 Pa. St. 223; *Adkins v. Atlanta etc. R'y Co.*, 27 S. C. 71; *Southwest Imp. Co. v. Andrews*, 86 Va. 270.

## COMMONWEALTH v. WEISS.

[120 PENNSYLVANIA STATE, 247.]

**CRIMINAL LAW — GUILTY KNOWLEDGE OR INTENT, WHEN NOT ESSENTIAL TO CRIME.** — Guilty knowledge or intent is generally an essential element in crime; but under a statute providing police regulations, and commanding that an act be done or omitted, which in the absence of such statute might be done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation.

**CRIMINAL LAW — GUILTY KNOWLEDGE OR INTENT AS ESSENTIAL TO CRIME, HOW DETERMINED.** — Whether or not a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute, in view of its manifest purpose and design.

**CRIMINAL LAW — GUILTY KNOWLEDGE NOT ESSENTIAL TO CRIME OF SELLING OLEOMARGARINE.** — Under a statute prohibiting the sale of oleomargarine, imposing a penalty for its violation, and containing no implication that the prohibited act must be done knowingly or willfully, ignorance of the real nature of the article sold will not constitute a defense for a violation of the statute.

*John S. Ferguson*, for the appellant.

*William Yoet*, for the appellee.

CLARK, J. This was an action brought to recover the penalty of one hundred dollars provided for in the third section of the act of May 21, 1885 (P. L. 22), commonly known



as the oleomargarine act. At the trial, the defendant submitted a point requesting the court to instruct the jury "that if they [the jury] believe from the evidence that the defendant did not knowingly furnish, or authorize to be furnished, or know of being furnished, to any of his customers, any oleomargarine, but, so far as he knew, furnished genuine butter, then the verdict must be for the defendant." The point was refused; and whether the court was right in refusing it, as we understand the case, is the only question upon which a decision is desired. The argument contained in the paper-book, as well as the oral argument in this court, was directed to this question only, and we assume that the parties intended to raise no other. That portion of the charge in which binding instructions were given to find for the plaintiff is not quoted *in totidem verbis* in the assignments of error, according to our rules; it would seem, therefore, that the appellant's intention is to confine our deliberations to the single question referred to.

The first and third sections of the act of 1885 provide as follows:—

"1. That no person, firm, or corporate body shall manufacture, out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell, or offer for sale, or have in his, her, or their possession with intent to sell, the same as an article of food."

"3. Every person, company, firm, or corporate body who shall manufacture, sell, or offer or expose for sale, or have in his, her, or their possession with intent to sell, any substance the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable, with costs, by any person suing in the name of the commonwealth, as debts of like amount are by law recoverable," etc.

Guilty knowledge or guilty intent is, in general, an essential element in crimes at the common law, but statutes providing police regulations in many cases make certain acts penal, where this element is wholly disregarded. The distinction is thus laid down in 3 Greenl. Ev., sec. 21: "The rule [i. e., that ignorance of fact will excuse] would seem to hold good in

all cases where the act, if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the parties to know the facts, and to obey the law at their peril." To the same effect, also, is Wharton's Crim. Law, secs. 83, 2442.

Whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense, therefore, is a matter of construction. It is for the legislature to determine whether the public injury, threatened in any particular matter, is such and so great as to justify an absolute and indiscriminate prohibition. Even if, in the honest prosecution of any particular trade or business, conducted for the manufacture of articles of food, the product is healthful and nutritious, yet, if the opportunities for fraud and adulteration are such as threaten the public health, it is undoubtedly in the power of the legislature, either to punish those who knowingly traffic in the fraudulent article, or, by a sweeping provision to that effect, to prohibit the manufacture and sale altogether. The question for us to decide, therefore, is, whether or not, from the language of the statute, and in view of the manifest purpose and design of the same, the legislature intended that the legality or illegality of the sale should depend upon the ignorance or knowledge of the party charged.

The statute in question was an exercise of the police power, and the act was sustained upon this ground not only in this court, but also in the supreme court of the United States: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 359; *Powell v. Pennsylvania*, 127 U.S. 678. The prohibition is absolute and general; it could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act

shall be done knowingly or willfully, and if it did, the design and purpose of the act would be practically defeated. The intention of the legislature is plain, that persons engaged in the traffic shall engage in it at their peril, and that they cannot set up their ignorance of the nature and qualities of the commodities they sell as a defense.

In Massachusetts, a statute declared that if any person should "sell, keep, or offer for sale adulterated milk," he should be punished, etc.; and it was held that the penalty was incurred, although the sale was made without any knowledge of the adulteration, as when the seller had bought the milk for pure milk: *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Nichols*, 10 Allen, 199. Upon the same ground, it has been held, and it is familiar law, that the statutes against selling intoxicating liquors are violated although the vendor does not know that it is intoxicating: *Commonwealth v. Boynton*, 2 Allen, 160; *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Hallett*, 103 Mass. 452. Where a statute imposed a penalty upon "any person who shall sell, or keep for sale, naphtha, under any assumed name," a party charged with the offense was held to be guilty, although he was not aware that the article sold was naphtha, but believed it to be some other oil: *Commonwealth v. Wentworth*, 118 Mass. 441. So where a party is charged with furnishing liquors to minors, or for permitting a minor to play billiards in his saloon, he is not permitted to set up his ignorance of the minor's age to defeat the charge: Wharton's Crim. Law, sec. 2442, and cases there cited. In our own case, *In re Carlson's License*, 127 Pa. St. 330, Carlson, in a proceeding to revoke his liquor license, under the act of May 13, 1887 (P. L. 113), was charged with furnishing liquors to minors, in violation of the seventeenth section of the same act. He admitted the sale of liquors to the minors in question. His excuse was, that their appearance indicated that they were of full age, and that, as a precaution before selling, he asked their age, and each responded that he was of full age; that he sold to them in good faith, fully believing them to be so. Under the act of 1854, a necessary element to constitute the offense was that the sale should be willful, but in the act of 1887 the word "willfully" was omitted, and it was enacted "that it shall not be lawful for any person, with or without license, to furnish, by sale, gift, or otherwise, . . . any spirituous, vinous, malt, or brewed liquors, . . . at any time, to a minor."

His license having been revoked, the case was brought here for review, and the proceedings were affirmed. Chief Justice Paxson, delivering the opinion of the court, said: "If we look into the opinion of the court for the facts, we find nothing to help the plaintiffs. From it we learn that the offense of which the plaintiffs in error were guilty was that of selling liquors to minors, and that the only excuse offered was that they did not know the persons to whom they sold were minors. This ignorance is not a sufficient excuse or justification under the act of assembly. If such a defense could be successfully interposed in such cases, there would be few convictions, and the law would be nullified for all practical purposes." To the same effect are *Commonwealth v. Sellers*, 130 Pa. St. 32; *Commonwealth v. Holstine*, 132 Pa. St. 357; and *Commonwealth v. Zelt*, 138 Pa. St. 615.

We are of opinion that judgment was rightly entered for the plaintiff, and the judgment is affirmed.

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**CRIMINAL LAW—GUILTY KNOWLEDGE OR INTENT—TEST OF.**—The test of criminal responsibility is the knowledge that the act was wrong: *State v. Bundy*, 24 S. C. 439; 58 Am. Rep. 262; *Stern v. State*, 53 Ga. 229; 21 Am. Rep. 266, and note.

**CRIMINAL LAW—GUILTY KNOWLEDGE OR INTENT, WHEN NOT ESSENTIAL TO CRIME.**—Ignorance of the law is no excuse: *State v. McIntire*, 1 Jones, 1; 59 Am. Dec. 566, and note; *Stow v. Converse*, 3 Conn. 325; 8 Am. Dec. 189.

**CRIMINAL LAW—GUILTY KNOWLEDGE OR INTENT NOT NECESSARY TO CONSTITUTE THE CRIME OF SELLING OLEOMARGARINE.**—It is not essential to the guilt of a person selling oleomargarine colored that he should know that it was so colored: *State v. Newton*, 50 N. J. L. 534.

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## ROBINSON-REA MANUFACTURING CO. v. MELLON.

[130 PENNSYLVANIA STATE, 257.]

**ARBITRATION—AWARD—DEFENSE.**—Where the award of an arbitrator is to be conclusive by agreement of the parties, the fact that after the award was made the arbitrator ordered a rehearing upon the application of the defeated party is no defense to an action on the award.

**ARBITRATION—AWARD—RIGHT TO REOPEN.**—Where an award by an arbitrator is to be conclusive by agreement of the parties, the arbitrator, after making his award, may correct any error appearing upon its face; but he cannot reopen it, go into a general hearing, and take testimony, upon the mere allegation of the defeated party that supposed errors exist.

*W. F. McCook*, for the appellant.

*George B. Gordon, John Dalsell, and William Scott*, for the appellee.

PAXSON, C. J. This was a suit upon an award. The contract between the plaintiff company and the defendant stipulated that in case of any dispute arising under said contract, the decision of the engineer should be final and conclusive. The engineer was the engineer of the defendant. The matters in dispute were submitted to J. H. McRoberts, the engineer referred to, who made an award in favor of the plaintiff for the amount of its claim. The defendant is not satisfied with the decision of his own engineer, and claims to have a retrial before a jury. Various reasons are assigned for this in the affidavit of defense, the most material of which is, that the award was not a completed award; that after it was made, the arbitrator discovered that he had made some mistakes, and proposed to reopen said award for the purpose of correcting them.

The arbitrator, in his order for opening the award, says: "Believing it to be my duty to receive evidence of and inquire into any alleged mistakes which I may have made in the premises, I hereby reopen the case for such purpose, so far as within my power so to do; and I appoint the eighth day of January, 1890, at two o'clock, P. M., at my office, 400 Grant Street, Pittsburgh, as the time and place for said purpose, when and where evidence on said application will be received by sworn affidavits or depositions, and properly authenticated documents, or by oral testimony, but not otherwise."

It will be observed that no errors in the award are specified; it is not even averred that they exist. All that is stated is, that "the day after the same [the award] was made, the said arbitrator discovered such facts as convinced him of the necessity of opening the same and examining the matter in dispute," — not a word about mistakes. Nor does the arbitrator say he made any mistakes. What he says is, that the defendant has alleged serious mistakes, and because of such allegation he believed it his duty to open the award and take testimony in regard thereto. The arbitrator would perhaps be entitled to correct a clerical or other error appearing upon the face of the award. This is not such case, however. The arbitrator, after he has made his award and delivered it to the successful party proposes to reopen it, not to correct an admitted error, but to go into a general hearing and take testimony, upon the mere

allegation of the defeated party that supposed errors exist. We know of no authority to sustain such a proceeding as this. If we were to do so, who can say when an award would become final, and litigation end? If an award may be opened in this way after two weeks have elapsed, why not after two months or two years?

The affidavit does not aver any fraud or misbehavior on the part of the arbitrator. Indeed, it would have been ungracious for the defendant to have made such charges against his own engineer. We find nothing in the affidavit which discloses a legal defense, and the judgment of the court below is affirmed.

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**ARBITRATION AND AWARD—AWARD, WHEN NOT FINAL.**—An award is not final, though signed and sealed, where the arbitrators keep it in their own hands, with a view to hearing any objections the parties might make, and weighing and deciding them: *Byars v. Thompson*, 12 Leigh, 550; 37 Am. Dec. 680, and note, for a discussion of the subject of the impeachment of awards. If arbitrators have acted in good faith, neither party will be allowed to avoid the award by showing error in judgment: *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 106. A reappraisement, made by consent of all parties, cannot be objected to: *Betsill v. Betsill*, 30 S. C. 505.

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## CONROY v. PITTSBURGH TIMES.

[129 PENNSYLVANIA STATE, 334.]

**LIBEL.—PRIVILEGED COMMUNICATION** in libel is one made upon a proper occasion, from a proper motive, in a proper manner, and based upon reasonable or probable cause.

**LIBEL.—PRIVILEGED COMMUNICATION—PROOF OF MALICE.**—In cases of libel, where the publication is defended as privileged, there is no *prima facie* presumption of malice arising from the publication. Malice must be shown by other evidence, either intrinsic, from the style and tone of the article, or extrinsic, as actual malice, known falsity, want of probable cause, or by any evidence tending to overcome the *prima facie* presumption of protection under the privilege.

**LIBEL CHARGING INDICTABLE OFFENSE—PRESUMPTION OF INNOCENCE—PROOF OF PRIVILEGE.**—When a publication charges an indictable offense, and is libelous *per se*, the presumption of innocence of the crime charged is *prima facie* evidence of the falsity, want of probable cause, and malice of the publication, and sufficient to put the defendant to proof of the facts that the publication was privileged.

**LIBEL** based upon the following publication, which appeared in the Pittsburgh Times:—

“THE DIVES MUST GO.

“At No. 2 Diamond Square, Mike Conroy runs a joint that is every bit as bad as the one Tom O'Brien used to run. In

no way has he been put out by Mayor McCallin's demonstration in favor of morality and good order. The low characters that have been barred out of the other places in the vicinity all flock into Conroy's and are made welcome. A one-legged dancer has been employed and makes the night hideous in his attempts to keep time to the jangling of the wretched instrument that was once a piano. Conroy also has a habit of closing his front doors about midnight, and keeping the crowd in the back room until near morning, or until they run short of money or his beer gives out. Every night at his place can be seen thieves, sand-baggers, pickpockets, and the lowest of abandoned women. The one-legged clog-dancer employed in this place is a noted crook. He has served several years in the penitentiary for highway robbery, and has only been at liberty a few months. Conroy need not be surprised to see a delegation of Mayor McCallin's police walk down that way some time, and stay just long enough to do business with the proprietor and the inmates."

The defendant claimed that such publication was privileged. The plaintiff suffered a judgment of nonsuit, and appealed.

*Thomas M. Marshall, Jr., and William Reardon, for the appellant.*

*George C. Wilson, George B. Gordon, and S. H. Shannon, for the appellee.*

MITCHELL, J. A privileged communication is defined as one made upon a proper occasion, from a proper motive, and based upon reasonable or probable cause: *Briggs v. Garrett*, 111 Pa. St. 404, 414; 56 Am. Rep. 274. Perhaps there ought also to be added that it should be made in a proper manner; for if the manner be improper, the privilege is lost. The publication complained of by appellant charges an indictable offense, and is libelous *per se*. It may be conceded that it belongs to the class of qualified privilege. In such cases it is common to say that the plaintiff must prove express malice. I apprehend, however, that the more accurate statement of the law is, that in such cases there is no *prima facie* presumption of malice from publication. There must be some evidence beyond the mere fact of publication, but there is no requirement as to what the form of the evidence shall be. It may be intrinsic, from the style and tone of the article. "If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the

case shall be given to the jury": Trunkey, J., in *Neeb v. Hope*, 111 Pa. St. 145, 154. Or it may be extrinsic, as by proof of actual malice, or that the statement was knowingly false, or that it was made without probable cause, or in any way that fairly and reasonably tends to overcome the *prima facie* presumption of protection under the privilege. One of such ways is by the counter-presumption of innocence. "Probable cause that would justify such publication [charging larceny] would justify a prosecution for the alleged crime": *Neeb v. Hope*, 111 Pa. St. 153. And the reason for it is, that the presumption of innocence cannot be overcome by mere rumor, or idle report, or careless and insufficient examination set up as probable cause. So where the alleged libel charges an indictable offense, the presumption of innocence ought and must stand as *prima facie* evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege.

A brief consideration of two fundamental principles will be sufficient to sustain this result: 1. The immunity of a privileged communication is an exception. The general rule is, that nothing but proof of its truth is a defense of a libel. That it was privileged, because published on a proper occasion, from a proper motive, and upon probable cause, is the excepted case, and he who relies on an exception must prove all the facts necessary to bring himself within it. 2. Unless his action is founded on a negative averment, a plaintiff is not, in general, obliged to prove a negative, and the inconveniences of a departure from this rule are many. For example, in cases like the present, how is a plaintiff to proceed? Actual or special malice can rarely be proved; in fact, it rarely exists. Libelous articles in newspapers seldom spring from any hostility to the individual, but usually from a ruthless disregard of personal feelings and private rights, in the mad hunt for news and sensations. The only chance of redress for the plaintiff, therefore, is, ordinarily, the want of probable cause; and how is he to prove this? It was held in *Flitcraft v. Jenks*, 3 Whart. 158, that he could not do it by evidence of good character and the consequent improbability of his doing the act charged; and how is he to prove specific facts in the dark, before the facts relied on as probable cause are shown by defendant? The natural and logical order of proof is for defendant to show the information on which he relied for probable cause, and for the plaintiff then to meet it in rebuttal. And this is the order that seems to be indicated by Brackenridge, J., in *Gray v. Pent-*



land, 2 Serg. & R. 23: "The plaintiff may, if he chooses, either, in the first instance, with a view to aggravate damages, go on to show express malice; or, after an attempt by the defendant to show probable cause, he may rebut this by proof of express malice." It is true that actions like the present are closely assimilated to actions for malicious prosecution, in which the plaintiff must give evidence of want of probable cause. But the latter actions are founded on the want of probable cause; it is an essential element of plaintiff's case; while in actions of libel it is an element, not of plaintiff's case, but of defendant's claim of privilege.

The law, in cases of privilege, has been lenient to the claim, but it must not be allowed to become lax. Our own decisions have followed the general trend, in enlarging the class of qualified privilege, and giving a wide reach to its protecting mantle; but we do not regard any of them as in conflict with the reasoning herein followed. A brief reference to the most important of them will indicate our views in this respect. In *Gray v. Pentland*, 4 Serg. & R. 422, and *Flitcraft v. Jenks*, 3 Whart. 158, the publications were not libelous *per se*; in *Chapman v. Calder*, 14 Pa. St. 365, the evidence of probable cause was offered by defendant; in *Pittock v. O'Neill*, 63 Pa. St. 253, 3 Am. Rep. 544, if there was any privilege in the publication at all (and speaking for myself only I do not think there was), it was lost by the nature of the comment, and the same is to be said of *Barr v. Moore*, 87 Pa. St. 385, 30 Am. Rep. 367, and *Neeb v. Hope*, 111 Pa. St. 145; in *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, it was held that the letter of Lovegrove, given in evidence by plaintiff, sufficiently showed probable cause for defendant's action; and in *Press Co. v. Stewart*, 119 Pa. St. 584, the publication was held not to be libelous at all.

As a result, we are of opinion that where the publication charges an indictable offense, the presumption of innocence is *prima facie* evidence of falsity and want of probable cause, and sufficient to put defendant to proof of the facts to support his claim of privilege. It follows that this case should have been allowed to go to the jury.

Judgment reversed, and *venire de novo* awarded.

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**LIBEL — PRIVILEGED COMMUNICATIONS — WHAT ARE —** As to what communications are privileged, see *Pollasky v. Minchener*, 81 Mich. 280; 21 Am. St. Rep. 516, and note; *Smith v. Smith*, 73 Mich. 445; 16 Am. St. Rep. 594, 596; *Park v. Detroit F. P. Co.*, 72 Mich. 560; 16 Am. St. Rep. 544; *Missouri*

*P. Ry Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794, and note; *Madlister v. Detroit F. P. Co.*, 76 Mich. 338; 15 Am. St. Rep. 318, and note; *Woods v. Wiman*, 122 N. Y. 445.

**LIBEL — PROOF OF MALICE.** — As to when proof of actual malice is necessary in actions for libel, see *Kent v. Bangartz*, 15 R. I. 72; 2 Am. St. Rep. 870, and note.

**EVIDENCE — PRESUMPTION OF INNOCENCE.** — The presumption of innocence should be indulged in a civil case, where the pleadings do not charge a criminal offense, but either side relies upon establishing a criminal offense against the other: *Sprague v. Dodge*, 48 Ill. 142; 95 Am. Dec. 523, and note, wherein is discussed the question of proving a crime in actions of slander and libel.

## BUNTING v. HOGSETT.

[189 PENNSYLVANIA STATE, 363.]

**NEGLECT — PROXIMATE CAUSE.** — In cases where negligence is alleged, the question of proximate cause is ordinarily for the jury; but when the facts are not in dispute, the question is for the determination of the court.

**NEGLECT — PROXIMATE CAUSE.** — One guilty of negligence is deemed to have foreseen, and is liable for all consequences which may naturally ensue therefrom without the intervention of some other independent agency, although, in advance, the actual result might have seemed improbable.

**NEGLECT — PROXIMATE CAUSE.** — A railroad engineer, whose negligence is about to cause a collision, is justified in leaping from his engine to save his life, in any criminal aspect of the case, even though, in so doing, he puts in jeopardy the lives of others; but he or his employer is liable in damages for an injury to a third person caused by a collision resulting from the engineer's primary negligence, and rendered possible by his leaping from his engine.

**NEGLECT — PROXIMATE CAUSE.** — In actions involving questions of negligence and proximate cause, the inquiry is based on whether or not there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In the absence of such cause, an act of negligence is considered the proximate cause of all injury resulting therefrom.

**NEGLECT — LIABILITY FOR CONCURRENT NEGLIGENCE.** — When a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, both tort-feasors are liable jointly and severally to him in damages.

**NEGLECT — FACTS REDUCING DAMAGES.** — Where a plaintiff, in an action to recover for personal injuries caused by negligence, is shown to be suffering from Bright's disease of the kidneys, not caused by the injury, the jury should take that fact into consideration in determining his expectancy of life and loss of earning power.

*Thomas C. Lazear, Charles P. Orr, and A. D. Boyd*, for the appellant.

*Thomas Patterson and Edward Campbell*, for the appellees.

## HOGSETT'S APPEAL.

CLARK, J. The defendant, Robert Hogsett, is the owner of the Lemont furnace, on the line of the Southwest Pennsylvania railroad, and the plaintiff, who, on the 13th of October, 1883, was a passenger upon one of the railroad trains, brings this suit to recover damages for a personal injury, received through the alleged negligence of the defendant's employees. It appears that a railroad track was used in connection with the furnace, and that what is called a donkey-engine was operated thereon, in furnishing supplies of stock, ore, and coke to the furnace. The furnace-track, in running out from the furnace to the coke-ovens, forms, as it were, the arc of a circle, and the railroad track, crossing the furnace track twice, subtends the arc as a chord.

The collision which occurred at the first crossing was caused by the culpable negligence of the defendant's engineer; this fact is conclusively established by the verdict of the jury, and in the determination of the questions of law raised upon the assignments of error, this fact must necessarily be assumed. It is unnecessary, therefore, to refer to the evidence bearing upon that question. The appellant's contention is, however, that, as the plaintiff's injuries were not received in that collision, but in the collision which subsequently occurred at the other extremity of the chord, the negligence of the engineer, under the circumstances, cannot be regarded as the proximate, but as the remote, cause of the injury. Ordinarily, the question of proximate cause is for the jury; but where the facts are not in dispute, the determination of that question is for the court: *West Mahanoy Township v. Watson*, 112 Pa. St. 574; 56 Am. Rep. 336; 116 Pa. St. 344; 2 Am. St. Rep. 604. Some reference to the undisputed facts, therefore, is necessary to a complete understanding of the question thus raised.

It is conceded that in the first collision, although no one was injured, the rear truck of the rear coach of the passenger train was derailed. The brakeman pulled the automatic cord which operates the air-brakes. The engineer put on the air from the engine, and the truck having regained the track, the train, which consisted of three cars, came to a full stop, with the middle car standing upon the second crossing. The engineer of the donkey says that about the time of or immediately before the collision, he reversed his engine, shut off the steam, and, fearing that they would be crushed, both the engineer and the fireman jumped from it to the ground. By

some means, however, presumably by the jar of the collision, the throttle was reopened, and the donkey at once started with some speed around the arc to the second crossing, where it came in collision with the middle coach, in which the plaintiff was riding. The injuries complained of were received in this second collision. The appellant's contention is, that the throttle having been closed before Leehan, the engineer, left the donkey, the second collision, under all the circumstances, could not have been foreseen by him as the natural and probable consequence of his conduct, and that, being in fear of his life, he had a right to quit the engine for a place of safety. It may be, perhaps, that the engineer and fireman, being under actual apprehension of great bodily harm, were, in any criminal aspect of the case, justified in leaping from the engine to save themselves, even if in so doing they should put in jeopardy the lives of others. But assuming this to be so, it must be remembered that it was their own negligence which put them in fear of their lives, and constrained them to leap from the engine, and submit it, without control, to the consequences of the collision. They will be justified, perhaps, as we have said, in saving themselves, but it does not follow that either they or their employer would not be held for the negligent act, which not only put them in peril, but resulted in personal injury to the plaintiff.

It is true, as the appellant contends, that the injury must be the natural and proximate consequence of the negligence, — a consequence likely to flow from the negligent act. The engineer would be held to have foreseen whatever consequences might ensue from his negligence without the intervention of some other independent agency, and both his employer and himself would be held for what might, in the nature of things, occur in consequence of that negligence, although, in advance, the actual result might have seemed improbable: *Oil City Gas Co. v. Robinson*, 99 Pa. St. 6. We do not know that the throttle was opened by the jar of the collision, only from the fact that it was liable to be so, and the engineer will be presumed to have foreseen what was liable to occur. The inquiry must always be, whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury: *Milwaukee etc. Ry Co. v. Kellogg*, 94 U. S. 469. But no intermediate cause, disconnected with the primary fault, and self-operating, existed in this case, to affect the question of the defendant's liability:

It was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent whatever; the first collision derailed the truck, and at the same instant opened the throttle and turned loose the destructive agency which inflicted the injuries complained of. The negligence of the defendant's engineer was the natural, primary, and proximate cause of the entire occurrence.

The appellant's further contention, however, is, that as plaintiff was a passenger on the Southwest Pennsylvania Railroad Company, it was a proper and legal defense for him to show that the negligence of the railroad company contributed to the injury; that in such case the negligence of the company, which was a common carrier, must be imputed to the plaintiff as a passenger in the carrier vehicle. *Lockhart v. Lichtenthaler*, 46 Pa. St. 151, and *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91, are cited in support of this doctrine. In *Lockhart v. Lichtenthaler*, 46 Pa. St. 151, it was held that where a passenger in a carrier vehicle is injured by a collision, resulting from the negligence of those in charge of it and those in charge of another vehicle, the carrier only is answerable for the injury; and this case was followed by *Philadelphia etc. R. R. Co. v. Boyer*, 97 Pa. St. 91, where the same rule was applied. The decision in *Lockhart v. Lichtenthaler*, 46 Pa. St. 151, as we said in *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 520, 15 Am. St. Rep. 733, was made by adopting the conclusion of the English courts in *Bridge v. Grand Junction R'y Co.*, 3 Mees. & W. 247 (1838), in the exchequer; *Thorogood v. Bryan*, 8 Com. B. 115; 65 Eng. Com. L. 114; and *Catlin v. Hills*, 8 Com. B. 123 (1849), in the common bench. These cases were followed in the exchequer, in *Armstrong v. Lancashire etc. R'y Co.*, 44 L. J. Ex. 89 (1875); L. R. 10 Ex. 47.

But *Thorogood v. Bryan*, 8 Com. B. 115, 65 Eng. Com. L. 114, which is the leading case, has recently been overruled in the English court of appeals: *The Bernina Mills v. Armstrong*, 12 Pro. & D. 58; and the doctrine, although formerly accepted in many of the states, is now generally disapproved. The authorities in England, and the great current of authority in this country, are against it. The cases are collected in *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 520; 15 Am. St. Rep. 733. They are numerous, and it is unnecessary to refer to them here. What was there said was given as an individual opinion merely, and was, to some extent perhaps, obiter

*dictum*; but we are now unanimously of opinion that the views there expressed somewhat in advance contain a proper exposition of the law. The identification of the passenger with the negligent driver, or the owner, or with the carrier, as the case may be, without his co-operation or encouragement, is a gratuitous assumption. As Mr. Justice Field said in *Little v. Hackett*, 116 U. S. 366: "There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant; neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The *rationale* of the rule of *Thorogood v. Bryan*, 8 Com. B. 115, 65 Eng. Com. L. 114, is expressly disavowed in our own case of *Lockhart v. Lichtenhaler*, 46 Pa. St. 151, and it is now rejected as untenable and wholly indefensible.

Nor is there any rule or principle of public policy which will support such a doctrine. If a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, there is no reason, founded in public policy or otherwise, which should release one of them and hold the other. It is true, the carrier may be subjected to a higher degree of care than his co-tort-feasor, but this affords no reason why either or both of them should not be held to that degree of care, respectively, which the law imposes upon them, and to be answerable in damages accordingly. The general rule undoubtedly is, if a person suffers injury from the joint negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally, and it would seem, in principle, to be a matter of no consequence that one of them is a common carrier. Neither the comparative degrees of care required, nor the comparative degrees of culpability established, can affect the liability of either.

The whole subject is fully discussed in *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 520, 15 Am. St. Rep. 783, and we do not desire to repeat what was there said. We think the law was correctly stated in the charge, and in the answers to the points submitted by the defendant's counsel, and the judgment is affirmed.

#### H. C. BUNTING'S APPEAL.

CLARK, J. There was evidence in this case that the plaintiff, Henry C. Bunting, at the time of the trial was suffering

from what is known as Bright's disease of the kidneys. Upon a chemical analysis, albumen was found in his urine; he suffered from dizziness, failure of sight, and double vision; he was feeble, had shortness of breath, and a staggering gait, and exhibited other symptoms of this malady. The testimony of some of the medical experts was, that they believed him to be suffering from Bright's disease, and there was little, if any, evidence to the contrary. The court very properly, therefore, instructed the jury that there was proof of this fact in the case; that it was a dangerous disease, and that they should take this into consideration in determining Mr. Bunting's expectancy of life and the loss of his earning power. Nor was there any evidence to justify the jury in finding that this disease was caused by the personal injuries received in the collision.

The judgment is therefore affirmed.

#### P. J. BUNTING'S APPEAL.

CLARK, J. As we find no assignments of error filed in this case, the appellant stating that none will be filed, the prothonotary is directed to enter a *non prosequitur*.

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**NEGLIGENCE — PROXIMATE CAUSE — TEST OF.** — Proximate cause in reference to negligence is where the facts constitute a continuous succession of events so linked together as to become a natural whole, and are the consequence of the accident; *Haverly v. State etc. R. R. Co.*, 135 Pa. St. 50; 20 Am. St. Rep. 848, and note.

**NEGLIGENCE — PROXIMATE CAUSE — QUESTION OF LAW OR OF FACT.** — Proximate cause is ordinarily a question for the jury to decide: Note to *Haverly v. State Line etc. R. R. Co.*, 20 Am. St. Rep. 852; but when the undisputed facts prove actual negligence, it becomes a question for the court: *Fox v. Sackett*, 10 Allen, 535; 87 Am. Dec. 682.

**NEGLIGENCE — LIABILITY FOR CONCURRENT NEGLIGENCE.** — Where the concurrent negligence of two parties results in injury to a third, the negligence of neither is a defense to the negligence of the other, and both are liable in damages for the injury: *Gulf etc. R'y Co. v. McWhirter*, 77 Tex. 356; 19 Am. St. Rep. 755, and note; *Rankin v. Central P. R. R. Co.*, 73 Cal. 22; *McAdoo v. Richmond etc. R. R. Co.*, 105 N. C. 140.

**NEGLIGENCE — FACTS IN REDUCTION OF DAMAGES.** — The right to recover for personal injury is not impaired by the fact that the plaintiff was suffering with Bright's disease at the time of injury: *Louisville etc. R'y Co. v. Snyder*, 117 Ind. 435; 10 Am. St. Rep. 60, and note containing a full discussion of whether or not evidence of incurable disease may be given in mitigation of damages.

## MARSHALL v. ROLL.

[129 PENNSYLVANIA STATE, 309.]

**FRAUDULENT CONVEYANCE BETWEEN HUSBAND AND WIFE—RIGHTS OF SUBSEQUENT CREDITORS.** — A voluntary conveyance by an insolvent husband to his wife, with intent to place his real estate beyond the reach of creditors, is fraudulent and void as to his subsequent creditor without notice of the conveyance, and the record of it is not constructive notice to him.

**EJECTMENT** by A. M. Marshall against G. C. and Minnie A. Roll. Marshall claimed title under sheriff's deed in pursuance of sale made under a judgment against G. C. Roll in favor of Meyer and Lang. The defendants, G. C. and Minnie A. Roll, claimed title under prior deeds from them to one Drinker, and from him to Minnie A. Roll. The remaining facts found are stated in the opinion. Judgment for plaintiff, and the defendants appeal.

*John F. Cox, D. T. Watson, and C. C. Dickey*, for the appellants.

*Marshalls and Imbrie, J. A. Evans, and J. S. and J. E. Ferguson*, for the appellee.

Per CURIAM. The jury have found that at the time George C. Roll conveyed the real estate in controversy to his wife he was insolvent, and that the conveyance was made with the fraudulent intent of placing said real estate beyond the reach of his creditors. This finding was fully warranted by the evidence. It was alleged, however, that inasmuch as the conveyance was made and recorded before the indebtedness to Meyer and Lang arose, it was not fraudulent as to them. It does not appear that they had knowledge of the conveyance, and the record was not constructive notice to them. Had they been purchasers or mortgagees, the case might have been different. Meyer and Lang were mere creditors, and were not obliged to search the records every time they sold a bill of goods. The jury having found that the conveyance was made with intent to hinder and delay subsequent creditors, there is nothing left for us to discuss.

Judgment affirmed.

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**VOLUNTARY CONVEYANCES — RIGHTS OF CREDITORS.** — If a man who is insolvent settles or conveys his property to his wife, the law concludes the intention on his part of defrauding his creditors: *Note to Hagerman v. Buchanan*, 14 Am. St. Rep. 747; *Lehman v. Hawks*, 121 Ind. 541; *Diggs v. McCullough*, 69 Md. 592. And the same principle applies where the husband



pays the purchase-money and procures the conveyance of land in the name of his wife: *Russ v. Bromberg*, 88 Ala. 620. The purchase of property by a wife of insolvent husband is a suspicious circumstance: *White v. Olaby*, 100 Mo. 163; and the onus is upon her to prove that the purchase-money was paid by her out of her separate funds: *Bange v. Edwards*, 88 Ala. 382; *Levi v. Rothschild*, 69 Md. 343; *Yates v. Law*, 86 Va. 117.

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## CHARLES TYRRELL LOAN AND BUILDING ASSOCIATION v. HALEY.

[120 PENNSYLVANIA STATE, 476.]

**BUILDING ASSOCIATION — RIGHT OF STOCKHOLDERS.** — When stock in a building association has matured, although its maturity has not been declared by the association, the debt of a borrowing stockholder is paid; he is entitled to his securities, and the association has no right to recover a judgment against him for the amount of his loan.

**BUILDING ASSOCIATION — MATURITY OF STOCK — EVIDENCE.** — Where the constitution and by-laws of a building association provide for a division of profits when it shall be ascertained that stock has matured, a borrowing stockholder may show, when sued upon the security for his loan, that upon a proper application of such profits his stock has matured, and is worth par or is at a premium.

**BUILDING ASSOCIATION — DEFENSES OF BORROWING STOCKHOLDER.** — Where the stock of a borrowing stockholder in a building association has matured, he has a right to stop paying assessments, and rely upon the surrender of the security for his loan, and when sued thereon he may set up as an equitable defense and show that his stock has matured, as a substitute for a bill in equity for that purpose, or he may be entitled to a *mandamus* to compel the association to declare the maturity of his stock.

**EVIDENCE — REVIEW OF OFFER OF.** — The appellate court, in reviewing the refusal to admit an offer to show certain facts by a witness, will assume that he had sufficient knowledge to sustain the offer, in the absence of proof to the contrary, or objection to his competency as a witness.

*William Gorman*, for the appellant.

*John H. Sloan*, for the appellee.

PAXSON, C. J. The plaintiff below is a building association; the defendant is a stockholder in the same. He procured a loan of money from the association, and gave his bond and mortgage therefor. After his stock had matured, as he alleges, the association entered judgment upon the bond, by virtue of the warrant of attorney attached. This judgment was opened by the court below upon his application, and a trial had to ascertain how much was due upon the mortgage. The result was a verdict for the full amount. The defense was, that the stock of the series to which the defend-

ant belonged had fully matured, and was worth par, viz., two hundred dollars per share.

If the defendant is right in his contention, he certainly ought to have an opportunity of showing it, under his equitable plea of payment. As the case stands, he has a judgment at law against him for the full amount of the mortgage, which carries with it the costs of suit, while I see no relief from the effect of this judgment, except by a proceeding in equity, which involves additional expense and trouble. It would be unjust to subject him to all this, if in point of fact his series has matured. It is a well-settled rule that when such stock has matured the debt is paid, and the borrower is entitled to a return of his securities. There may be circumstances which prevent or delay the maturity of the stock in a given instance. This may result from fraud or mismanagement on the part of the officers of the association, or from loss on investments. But when the stock has fairly matured, I am unable to see what right the association has to recover a judgment against one of its stockholders for the amount of his loan.

While the case was not very fully or clearly presented, there appears to have been a dispute between the association and the defendant as to the maturity of the stock. The series to which the defendant belonged was started in 1877. He had nothing to do with the other series; as to them he was not a member of the association. With the profits or losses of other series he had no concern. He claimed, and upon the trial below offered to prove by Joseph Sheehan, a witness called by him, that "the stock, in the series in which defendant was a stockholder and had borrowed the loan in controversy, had reached a value of \$200; and further, that the stock upon which he had borrowed the loan in controversy was worth, in November, 1887, \$218.24 cents a share." This offer was objected to by the plaintiff, because "the constitution and by-laws provide a method for division of profits, and witness could testify only as a matter of judgment." The objection was sustained by the court below.

The witness was not a member of the association, and may not have had any knowledge upon the subject; yet as the offer was rejected, we must assume he would have sustained the offer. His means of knowledge could have been tested upon his cross-examination. The objection was to the competency of the evidence, not to that of the witness. If we

concede that the constitution and by-laws provide a method of the division of profits, it does not follow that the evidence, if received, would not have showed that they have been divided precisely as the constitution and by-laws direct. On the other hand, the profits of defendant's series may have been applied to some other series, to aid in part to make up its losses. All this the defendant had a right to show, yet the inquiry was throttled at its very commencement. It may be the defendant would have been entitled to a *mandamus* to compel the corporation to divide and apply the profits to their proper series, and to declare the series matured, or, if necessary, to file a bill in equity for a like purpose. But he was not bound to assume the position of an actor, and involve himself in the expense which either of these proceedings would have entailed upon him. If his series had matured, he was entitled to stop paying, and to rely upon the association surrendering his securities when the proper time arrived. If, instead of doing this, the association brings suit upon his mortgage, he can surely set up an equitable defense, and show that his stock has matured. Such defense is a substitute for a bill in equity for that purpose. To meet such defense the association can show, if the fact be so, that the stock has not matured; that it has met with losses; or any circumstances which tend to prove that the stock is not worth par. This is no hardship, as it has in its possession and under its control all the books, papers, and other evidence which bear upon the actual value of the stock. It can show how the profits have been divided; and if they have been divided contrary to law, the error can be corrected by the court. Such associations, while useful in many instances, are not above the law, and cannot arbitrarily dispose of the property of their members.

If the defendant can sustain his offer, he has a full defense to the mortgage, and we are of opinion the evidence should have been admitted.

The judgment is reversed, and a *venire facias de novo* awarded.

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BUILDING AND LOAN ASSOCIATIONS. — For the law of building and loan associations generally, see *Robertson v. American H. Ass'n*, 10 Md. 397; 69 Am. Dec. 165, and extended note, 159-166, wherein are discussed the rights of members and stockholders in such associations. See also *Line City Building etc. Ass'n v. Wagner*, 122 Ind. 78; 17 Am. St. Rep. 242, and note.

## LANTZ v. VERMONT LIFE INSURANCE COMPANY.

[139 PENNSYLVANIA STATE, 546.]

**INSURANCE — FORFEITURE — NON-WAIVER OF, BY AGENT.** — Where a policy of life insurance provides that if the premiums are not paid at maturity the policy becomes void; that the acceptance of a premium after maturity is not a waiver of the payment of future premiums at maturity; and that only the president and secretary together have power to alter policies or waive forfeitures, — the acceptance of overdue premiums by the company, and the promise of its agent, after the maturity of a subsequent premium, to accept it if paid before a certain time, is not a waiver by the company of the forfeiture caused by the failure to pay the last premium at maturity; and in the event of the death of the insured before the payment of such overdue premium, the policy is void.

**INSURANCE — FORFEITURE — REVIVAL.** — A policy of life insurance, forfeited for non-payment of a premium at maturity, can only be revived, as far as the insured is concerned, by the actual payment and acceptance of such premium, or by a contract based upon a sufficient consideration.

**INSURANCE — FORFEITURE — REVIVAL — WANT OF CONSIDERATION.** — Where a policy of life insurance is forfeited for failure to pay a premium at maturity, the unauthorized promise of the agent of the insurer to receive such premium, if paid within a certain time thereafter, is without consideration, and will not revive the policy.

*Rudolph M. Schick*, for the appellant.

*Adelbert E. Stockwell*, for the appellee.

**PAXSON, C. J.** This was an action on a policy issued by the defendant company, insuring the life of Simeon B. Lantz, for the benefit of his wife, Evalina E. Lantz, the plaintiff below. The policy stipulated that the premiums should be paid quarterly, on the nineteenth days of February, May, August, and November in each year; that if the said premiums should not be paid on the days named and in the lifetime of the assured, the policy should cease and determine; that the acceptance of a premium after maturity should not be deemed or construed as a waiver, or as any evidence of an agreement to waive the payment of any future premiums at the time the same shall, by the terms of the policy, become payable; and that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts or waive forfeitures.

Upon the trial below, it was among the admitted facts of the case that the premiums falling due in May, August, and November, 1887, were not paid at maturity, but were paid after maturity, and accepted by the company; that the premium due on February 19, 1888, was not paid at maturity; that on March 2, 1888, a brother of the insured, who was also

a policy-holder, called on the general agent of the company in Philadelphia, and informed the latter that Simeon B. Lantz would be down on March 6th to pay his premium, and was told that he, the agent, did not make out his monthly report until the 10th of the month, and that if the premium was paid by the 9th it would be all right. So far there is no dispute. But Mr. Lantz, the witness, testified that there was no condition annexed to the promise to receive the money, while Mr. Ryer, the agent, testified that he said he would receive the money, provided the insured was in his usual health at the time; that he would have to be satisfied upon this point, either by a health-certificate, or by seeing the insured personally, and that in the mean time the latter was carrying the risk himself. This question of fact was submitted to the jury, and they have found there was no condition annexed to the promise. We must therefore treat the case upon this basis.

It may simplify the discussion somewhat to note the following admission of the learned counsel for the company, to be found on page 12 of his paper-book: "It was admitted on the trial that the insured had paid three prior premiums after maturity, which had been received by the defendant; and also that the manager was in the habit of and practically had authority to receive premiums and deliver renewal receipts after maturity, provided that the insured was, at the time of the payment, in good health. This was as far as the testimony went. There was no evidence which, even the plaintiff pretends, goes to show that the agent had authority, or has ever acted beyond this, or that the company had ever known of or ratified such agreement; and it was further admitted that if Simeon B. Lantz, the insured in this case, had, on March 9th, been alive and in good health, and had tendered payment of the premium, it would have been received."

Simeon B. Lantz, the insured, was in good health on March 2d, but was taken ill on the next day, and died on March 6th.

The above admission disposes of any question as to the authority of the general agent to receive overdue premiums. But we must stop where the admission ends, unless a further or greater authority is to be found in the evidence. In order to establish an authority to receive an overdue premium after the death of the insured, one of two things must be shown, viz: 1. An express authority to do so, conferred upon him by

the company; or 2. Such a course of dealing on the part of the company, by ratifying or recognizing such acts of the agent, as would justify persons dealing with said company in assuming that he possessed such authority. There is not a word in the testimony to sustain either of these propositions. All that it shows was the receipt of overdue premiums on three occasions. But the insured was in full life and health at the time. The case of the plaintiff, if sustained at all, must rest upon the promise of the agent to receive the premium up to the ninth day of March. This promise, as before observed, the jury have found to be an unconditional one. This I understand to mean that the money would be received as late as the 9th of March, without regard to the health of the insured, or even his death prior to that time. It remains to consider the legal effect of such promise.

The first question which logically suggests itself is, What was the legal effect upon the *status* of the policy by the default or failure to pay the premium due on the 19th of February? Did it continue to bind the company and protect the insured thereafter? And if so, how long did it remain in force? Was it for a week, a month, or a year? I know of no instance in which a policy was held to be in force after such a default, unless in pursuance of a contract made between the company and the insured contemporaneous with the insurance, or during the life of the policy. In *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107, 100 Am. Dec. 621, the plaintiff offered to prove "that it is the custom among insurance companies to receive premiums if tendered at any time within thirty days of the time they fall due, provided the insured is in usual health, and that this is the custom among companies issuing policies stipulating that non-payments of premiums at the day shall be a forfeiture." This offer was rejected by the court below, and the rejection was held to be error, Chief Justice Thompson saying: "It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer." The grounds of this decision are obvious. While a custom which has grown into a law may not be heard, as a general rule, to affect the terms of a statute, nor a contract, to the extent of enlarging or abridging the force of it, yet it may interpret either: *Rapp v. Palmer*, 3 Watts, 178. The chief justice gives a number of examples of the application of this principle; among others, the familiar instance of the days of grace

on commercial paper. By the custom of merchants, so universal as to have grown into law, such paper is not due until three days after it purports to be due; or rather, the remedy is suspended during that period.

It was not alleged that any such custom existed in this case. There was not even an offer to show it, much less proof to support it. Did the fact that the company upon three prior occasions accepted the premium from the insured after maturity, the insured being in good health at the time, continue the policy in force after the default on the 19th of February? I know of no authority for such a proposition, and none has been called to our attention. It was, at most, a mere personal indulgence,—a matter of grace on the part of the company; and all that can be claimed for it is, that it may have led the insured to believe that if he again neglected to pay on the day, the money would be accepted if paid shortly thereafter, provided no change had occurred in his condition of health. The law upon this subject is so clearly stated by Mr. Justice Bradley, in *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252, that I need make no apology for quoting it at length: "The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff himself calls it, an act of leniency. It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured at the time; and in each instance in which it happened, it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions,

as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on an occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and to the public."

The consequence of a default in the payment of the premium is defined in the policy itself. It declares that if not paid on the days named and in the lifetime of the insured, the policy should "cease and determine." By this I understand that it is suspended; it ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. This term is often used, and I think inaccurately in such cases. Nor is the policy void in the general sense of that term. It is voidable at the election of the company, and that election can be exercised without notice to the assured, for the reason that the policy itself is notice that his rights cease with the non-payment of the premium. As to him it is a dead policy. It is true, it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees, in consideration of the premium, to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy: *Want v. Blunt*, 12 East, 183. I do not understand it to be contended that, had the assured died between the 19th of February and the 2d of March, there could have been a recovery on this policy. It seems almost a work of supererogation to cite authorities for so plain a proposition, and I will refer to but few, out of an abundance.

In *Washington etc. Ins. Co. v. Rosenberger*, 84 Pa. St. 373, which was a case of fire insurance, our brother Sterrett, after saying that the default suspended the protection of the policy, continued: "Upon the payment of the assessment, the policy would have been revived in its full vigor; but it was never paid, or even tendered, until after the fire, and, as delinquent policy-holders, they had no right to maintain the action without showing that the default was either waived or excused by the company. There is no evidence of waiver, nor do we think there is any evidence to excuse the default. There was considerable testimony showing that great indulgence was extended to delinquent members, and that the company was accustomed to receive assessments long after they were due; but



this is entirely consistent with the fact that while the default continued the protection of the policy was suspended." In *Lycoming F. Ins. Co. v. Rought*, 97 Pa. St. 415, it was said by Mr. Justice Mercur: "It is well settled, if a member of a mutual insurance company is in default in the payment of an assessment upon his policy, after due notice according to the by-laws and rules of the company, the protecting power of the policy is suspended until the assessment is paid. No recovery can be had for a loss sustained during the continuance of such default"; citing *Hummel's Appeal*, 78 Pa. St. 320; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; 24 Am. Rep. 172; *Washington etc. Ins. Co. v. Rosenberger*, 84 Pa. St. 373; *Crawford Co. etc. Ins. Co. v. Cochran*, 88 Pa. St. 230. It is true, these were cases of fire insurance companies, but the principle is equally applicable to a case of life insurance.

This we think sufficient to show that no recovery could have been had upon this policy had the assured died between the date of the maturity of the premium and the promise of the agent to accept the premium, on the 9th of March. Regarding that as a promise to accept the premium, even in the case of the previous death of the assured, we are led to inquire, in the first place, what authority had the agent to make such a promise? The condition of the policy is explicit that the premium must be paid "in the lifetime of the insured." Had the agent the authority to waive this condition? The policy not only declared that no person except the president and secretary, acting together, are authorized to make, alter, or discharge contracts, or waive forfeitures, but a notice to the same effect was printed on the back of each renewal receipt given to Mr. Lantz. It was not alleged that the president and secretary, acting together or singly, had ever waived this condition in the policy, or that they, or either of them, had given authority to the agent to waive it in this or any other instance. No course of dealing was shown on the part of the company by which the grant of such authority to the agent could be implied. There was not even an attempt to prove that the company or its agent had ever received an overdue premium after the death of the assured. There is nothing within the four corners of this record to show that the agent had authority, express or implied, to waive this condition. What right had the assured to suppose, with this condition in the very front of his policy, that the agent would receive his overdue premium after his death?

We are not without authority upon this point. The leading case is *Want v. Blunt*, 12 East, 183. The following statement of the facts is condensed from the opinion of Lord Ellenborough: The policy provided for the payment of quarterly premiums on March 25th, June 24th, September 29th, and 20th of December, during the life of the said W. W. Want, or within such time after those days, respectively, as is or shall be allowed for that purpose by the rules of the said society. It was provided by the rules of the society that if any member neglected to pay the quarterly premiums for fifteen days after the same became due the policy will be void. This provision was attached to the policy. The quarterly payments were all paid at maturity, until the one that came due on December 20th, which was not paid, and Want died on December 25th; and on December 27th, two days after his death, but within the fifteen days, his executors tendered the payment of the premium, which was refused. The court sustained the refusal, Lord Ellenborough saying, *inter alia*: "This is a contract of assurance, and must be construed according to the meaning of the parties as expressed in the deed or policy. . . . The risk insured against is his death, and the premium is a quarterly payment, to be made by him to the society during his life. The duration of the insurance is so long as he shall continue to make those quarterly payments; but the insurance is not to be void if he pay the quarterly premium within such time after the quarter-day as is allowed by the rules of the society. . . . The covenant on the defendant to pay the wife's annuity after Want's death is, 'if Want shall pay or cause to be paid the quarterly premium on every quarter-day during the life of Want, or within such time after as shall be allowed by the rules of the society for that purpose'; in construing which sentence, the expression 'during the life of Want' must be understood as applying to and carried on to the latter part of the sentence, and is the same as if the words 'during the life' had been repeated after the words 'within such time after,'—i. e., or 'within such time after, during the life.' . . . For these reasons, we are of opinion that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy, and that, on the true construction of the policy and rules of the society, the insurance could not be continued beyond the expiration of the quarter which ended on the 20th of December, by a tender of the premium by his executors after his death,

though within fifteen days after the quarter-day, so as to include within the policy the period of his death." In *Simpson v. Accidental Death Ins. Co.*, 2 Com. B., N. S., 257, the words of the policy were: "Provided he, the said insured, on or before . . . pay or cause to be paid to the defendant the annual premium"; and on this point the court said: "The policy was to continue, provided he, the insured, paid the premium within the twenty-one days; and this, we think, did not give the executors the right to pay it after his death." To the same point is *Pritchard v. Merchants' etc. Society*, 3 Com. B., N. S., 822; *Mutual Ben. L. Ins. Co. v. Ruse*, 3 Ga. 534. The rule laid down in *Want v. Bunt*, 12 East, 183, appears to have been followed in all subsequent cases where the same point arose. If there has been any departure, it has not been called to our attention.

If, however, we are wrong in this, — if we regard the condition in the policy that the premium must be paid in the life time of the insured as of no effect, or if effective, that it has been waived, — there is another reason why the company was not bound to receive the premium after the death of the assured.

I have endeavored to show that by the failure to pay the premium the policy lapsed, or was suspended, on the 19th of February. With the policy in this condition, the plaintiff proved, as already stated, an unconditional promise, on the part of the agent of the company, to accept the premium up to the 9th of March. In the ordinary case of the payment of an overdue premium, as all the authorities show, the policy does not bind between the default and the payment. The plaintiff claims that this case does not come within the rule; that the promise enlarged the time of payment, precisely as if March 9th had been the period stipulated in the policy; and that from the time the promise was made until the time it was to be fulfilled the policy was in full force. But if, as I have at least endeavored to show, the policy did not bind between the default and the promise, what occurred on the second day of March to change the situation of the parties and restore this dead policy to life? Was it the payment of the premium? The premium was not paid. Was it a promise to pay it? There was no such promise. There was nothing but the bare promise of the agent to accept the premium if paid by the 9th of March. Had it been paid by the assured prior to that date, and accepted by the company, the policy

undoubtedly would have been restored to life. This would result, not by virtue of the promise of the agent, but from the acceptance of the premium as a consideration for the renewal. It would have been a new assurance under the old policy. The mere promise of the agent, made after the default had occurred, to receive the premium up to March 9th was a *nudum pactum*. It was not a contract, because there were no contracting parties. The assured gave nothing, — promised nothing. A lapsed policy can only be restored to life, so far as the assured is concerned, by the actual payment and acceptance of the premium, or a contract based upon a sufficient consideration. What consideration did the company receive for carrying this risk from the 19th of February until the 9th of March? Had the insured lived until the latter date, and then refused or neglected to pay his premium, he would have had the benefit of an insurance on his life during said period without paying a dollar of consideration. For, as before stated, he did not give anything, nor did he promise anything. It was optional with him to pay; the company could not have enforced it against him had he declined. There is no provision in the policy which covers such a case. If the insured does not pay, the policy drops, and the contract relation ceases.

*Marvin v. Universal L. Ins. Co.*, 85 N. Y. 282, 39 Am. Rep. 657, is so exactly like the case in hand upon the facts that a reference to it will not be out of place. In that case, one Milton B. Marvin had a policy of three thousand dollars on his life, payable to his wife in case of his death. The premium due on the 13th of April was unpaid. On the 27th of April, Hinkle, the agent of the company, told the assured that if he paid the premium the next morning, the 28th, he, the agent, would receive the same. Hinkle went to the house of the assured the next day, and there found him lying sick upon his bed, and on being offered the overdue premium by the assured, declined to receive it at that time because the assured was then sick, but told him to keep the money, and when he got well, he, Hinkle, would receive it, and keep the policy alive. The assured never did recover from his sickness, the premium was not paid, and the company notified the assured that it would hold itself absolved from the contract by reason thereof. The assured died in the following September. Under this state of facts, it was held there could be no recovery upon the policy, the court below saying: "We think the plaintiff was properly nonsuited. As we under-

stand the law, as laid down by the court of last resort in such cases, in order to a valid extension of the time for the payment of a premium upon a life policy after the time of payment has gone by, there must be some valid consideration for the extension or waiver of the condition of payment, or there must be something said by or on behalf of the insurance company while the party bound to make the payment has still time and opportunity for so doing, by which the insured is induced to believe the condition is waived, or that strict compliance will not be insisted on. This introduces an element of estoppel in the case. In such a case, it would be unjust to allow the insurance company to repudiate the agreement, and to insist that, because of the non-payment of the premium punctually, which omission had been induced or countenanced by its own act, it should be absolved from the performance of its part of the contract."

This case was affirmed in the court of errors and appeals, in an opinion by Finch, J., principally upon the ground that even if Hinkle was the general agent of the company, he had no authority to waive the condition as to payment, the clause in the policy containing a condition similar in this respect to that in the policy in this case. For this reason, the court did not deem it necessary to express an opinion upon the ground upon which the court below rested the case, viz., the want of consideration for the promise, but said expressly: "It must not be inferred that we deem the ground of the decision below incorrect."

This case is valuable for the further reason that it shows very clearly the ground of the distinction between a promise to extend the time of payment made before the time of such payment and one made after the default. In the former instance, the assured may have relied upon the promise, and allowed the time to slip by; whereas, without such promise, he might have procured the money and paid the premium. Hence, the cases hold that the company, having misled the assured to his harm, are estopped from alleging a default because of non-payment on the day. But where a promise is made after the default, the assured has not been misled or injured in any manner. He has allowed his policy to lapse by his own neglect; it can only be restored by the consent of the company, and he has no reason to suppose that if he dies before the matter is perfected by the payment and acceptance of

the premium, the company will pay as in the case of a live policy.

In nearly every case cited to show the authority of an agent to bind the company by a promise made after a default to pay the premium, the decision of the court was rested upon the ground of estoppel,—a principle which I do not think has any application to the case in hand. In *Dean v. Aetna L. Ins. Co.*, 62 N. Y. 642, the agreement to extend the time was not only made before the premium became due, but the company had actually received the notes of the assured for the payment of three fourths of the premium. This not only introduced the element of estoppel, but the notes received constituted a valid consideration for the waiver of punctual payment. In *Homor v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478, the agreement extending the time of payment was also made before the premium fell due, and thus the policy-holder was prevented from paying the premium on the day it became due by the terms of the policy. In *Tennant v. Travelers Ins. Co.*, 31 Fed. Rep. 322, the credit was extended while the policy was in full force. In *Church v. Lafayette F. Ins. Co.*, 66 N. Y. 222, the dealings were between the assured and the home office, and no question was involved as to the authority of the agent. The court held there was evidence to go to the jury that a credit was intended, inasmuch as it showed a prior dealing with the assured for many years, and that he was in the habit of getting policies without paying for them at the time. In *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, there is an expression by Mr. Justice Bradley which indicates that he did not see any difference between a promise to extend the time of the payment of the premium made before the default, and a promise made after such default. In this case, however, there was not only a promise made to pay, but this was followed up by an actual tender of the premium, and a refusal by the company of such tender. This presents an entirely different state of facts from the case I am discussing, and Mr. Justice Bradley's remark must be taken in connection with the particular facts to which he was referring. In *New York L. Ins. Co. v. Eggleston*, 95 U. S. 572, the question was, whether the assured was excused for not paying his premium at maturity. This clearly appears from the concluding portion of the opinion of Mr. Justice Bradley. It is as follows: "The insured, residing in the state of Mississippi, had always dealt with agents of the company located either in his own state, or

within some accessible distance. He had originally taken his policy from and had paid his first premium to such agent, and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held that, under these circumstances, he had reasonable cause to rely on having such notice. The company itself did not expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles of his residence, but he had no knowledge of the fact; at least such was the finding of the jury from the evidence." *Phoenix Ins. Co. v. Doster*, 108 U. S. 30, is somewhat similar as to its facts. The assured was entitled to a dividend on the business of the company, which was set apart to the insured in part discharge of his premium. The company failed to notify him of the amount, and it was the cause of the delay in the payment.

In *Universal F. Ins. Co. v. Black*, 102 Pa. St. 585, the premium had been paid, and the question was, whether it had been paid to the proper person. In *Lebanon Ins. Co. v. Hoover*, 113 Pa. St. 591, 57 Am. Rep. 511, which was the case of a payment of the premium on a fire policy after maturity, there was a course of dealing, by which the agent gave the assured a credit in his accounts, and became himself the debtor of the company therefor. This clearly appears from the following extract from the opinion of Mr. Justice Sterrett: "On the trial, evidence was received tending to show that Fredrick, through whom the insurance was placed, was the recognized agent of the company for the purpose of securing risks, receiving and remitting premiums, etc.; that in his dealings with the company he was made its personal debtor for premiums on all policies issued through him, and that he periodically accounted to it therefor, whether the money was received by him from the persons to whom the policies were issued or not; that he made the persons or firms to whom he delivered policies his personal debtors, and dealt with them in that relation, charging them with the premiums on his books, sending them bills in his own name, and making himself responsible to the company for the same; and that the bills for premiums were generally rendered some time during the month after the insurance was effected."

I have not, of course, reviewed all the authorities cited; I have considered the most important. To review them all

would protract this opinion to such a length that no one would probably read it. No Pennsylvania case was cited which is in serious conflict with the views above expressed, nor have I been able to find one after a careful examination of the digests. It is possible I may, in the press of business, have overlooked some such case. We have little leisure to search for cases that are not cited. But I regard the overwhelming weight of authority, both in this state and elsewhere, to be in accord with the principles above stated; moreover, I believe them to be sustained by the sounder reason.

Under the circumstances, we think it was error for the learned judge below to charge the jury as follows: "Therefore, I think the question arises, and it is for you to say, in this case, whether this general superintendent, residing here in Philadelphia, with his principal in Vermont, and in the constant habit of doing this very thing, — because we find a number of receipts where he did receive the money subsequent to the time fixed, and it is testified to in this case that he certainly agreed to do it, and had done it in the case of Mr. Lantz, his brother, so that, if the rule was to be enforced as it is written, he would have no right to do this thing which he was in the habit of doing, and that therefore it is a question for you to say whether he had any authority, — whether the company, having permitted him to do this thing constantly and knowingly, had not authorized him — the secretary and president had not authorized him — to perform the acts that he was doing": See first assignment.

The "thing" which the agent had done and which the company had ratified was the acceptance, in three instances, of overdue premiums from the assured, he being in full life at the time. Authority beyond this could not be inferred from any act of the company or its agent. It was not denied — indeed it was expressly admitted — that had the assured tendered the premium during his lifetime, it would have been accepted, and the policy reinstated. No inference can be properly drawn from this, however, that the company would receive the premium after the death of the assured. The learned judge failed to note the difference between the renewal of a lapsed policy by the actual payment and acceptance of the premium, and a mere attempt to renew it without any consideration moving from the assured to the company. The one is a completed transaction, and therefore binding; the other is uncompleted, and does not even amount to a contract.



The same error runs through the charge. The assignments are all sustained. We think there should have been a binding instruction in favor of the defendant.

Judgment reversed.

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**LIFE INSURANCE — FORFEITURE OF POLICY — FAILURE TO PAY PREMIUMS WHEN DUE.** — When a policy provides for forfeiture in case of non-payment of premiums when due, and that no waiver of any condition shall be valid unless made at the head office, an extension for the time of payment made elsewhere by an agent is invalid: *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657. A clause in a policy rendering the policy void for non-payment of premiums when due does not render it void as to the insurer, but voidable, and this option must be clearly asserted: *Mutual Life Ins. Co. v. French*, 30 Ohio St. 240; 27 Am. Rep. 443. An insurance company having received overdue assessments when the policy might have been forfeited under the by-laws for non-payment can only thereafter insist on a forfeiture after giving notice that assessments must be promptly paid: *Stylos v. Wisconsin etc. L. Ins. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note. Where a policy contained a clause to the effect that agents cannot waive forfeitures, and an agent accepted overdue premiums under it, it was held that forfeiture was waived: *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528.

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## GHORMLEY v. SMITH.

[189 PENNSYLVANIA STATE, 684.]

**SPENDTHRIFT TRUST — VALIDITY OF, AS AGAINST CREDITORS.** — A grantor cannot create a spendthrift trust making himself or herself the sole beneficiary for life, with power to dispose of the trust property at death, so as to subject neither the income nor the corpus of the estate to the payment of his or her debts.

**SPENDTHRIFT TRUST — VALIDITY OF, AS AGAINST CREDITORS.** — Where an unmarried woman, not in contemplation of marriage, creates an irrevocable trust in her own property, for her own benefit for her life, without liability for her debts or contracts, and with power to dispose of it at death, the trust is void as to her creditors, and they may subject the income of her property to the payment of their claims.

*R. L. Ashhurst and Rowland Evans*, for the appellant.

*H. B. Gill, John R. Read, and Silas W. Pettit*, for the appellee.

CLARK, J. The conveyance of Henrietta T. Catherwood to the Philadelphia Trust etc. Co., dated July 23, 1879, was of all her estate, of whatsoever character, real or personal, in trust, to collect the income thereof, and after deducting expenses, etc., to pay the same, "when and as received, and not by way of anticipation," to the grantor herself, or to her appointee, for her life, whether she should remain sole or should

marry. The said incomes were declared to be "to and for her sole separate use and benefit, so that all and singular the said trust estate, rents and income thereof, and every part thereof, shall be absolutely free from, and not subject or liable to, the debts, control, or engagements of any husband she may have or marry, or to her own debts, control, or engagements; and for the said rents or incomes, the receipts of the said party of the first part, whether covert or sole, in her own name, or the receipt of her appointee or appointees, shall be a good and valid discharge in law of said trustee."

By the terms of the conveyance, the grantor, whether covert or discover, reserved to herself a power of appointment by will to her children, or to the issue of deceased children, if any she had at her death, or in default thereof, to whom she may see fit, subject, in either event, to the restriction that no gift to a surviving husband should exceed the net income of the trust estate during his life; in default of an appointment by will, then the estate to be conveyed to her children, and to the issue of deceased children, if any, absolutely in fee; or leaving no children, or the issue of deceased children, to such person or persons, for such estates, as they would have been entitled to under the intestate laws, if the grantor had died intestate and seised thereof.

The deed was declared irrevocable; and the trustees, immediately upon the execution and delivery thereof, entered into the possession, and assumed the duties of the trust. Soon afterwards the grantor, Henrietta T. Catherwood, became Henrietta C. Smith, by marriage with Edward A. Smith, and exercised a privilege reserved in the deed of withdrawing five thousand dollars for furnishing her house. She has now three children living.

The garnishees' answers set forth that they have in their hands net income, under the deed of trust, due to Mrs. Smith, amounting to \$561.52, and also certain income of property held in trust for Mrs. Smith under the will of her grandmother, Ann Catherwood, deceased. As to the latter, it was admitted that the provisions of the will protected it from attachment, and there was no contention whatever on that point. The court below entered judgment for the plaintiff for the full amount of his claim, out of the income in the garnishees' hands under the deed of trust, and it is this judgment which is appealed from. The question presented for the consideration of the court is solely as to the liability of

the income of the property, held by the garnishees under the deed of trust, to attachment for the debts of Mrs. Smith.

It is contended, on part of the appellees, that it is against the public policy, as well as the statute of Elizabeth, which was declaratory only, and was founded on public policy, that a person should settle his estate so that he may have the benefit of it during his life, and the disposal of it at his death, and yet not be liable to his creditors.

It is not pretended that the trust in question is sustainable as a trust for coverture, or for the separate use of the grantor, for she was then unmarried, and although she was in a very short time afterwards married, it was not shown, nor is it alleged, that it was created in contemplation of that event. No such question arises, and it is not necessary for us to consider the effect of the deed, if the grantor at the time had in contemplation the marriage relation which was afterwards formed. The claim of the attaching creditor cannot be affected or impaired, unless the transaction is what is known as a "spendthrift trust."

It is well settled in this state, since *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502, although before that a contrary doctrine prevailed, that where an active trust is created to give effect to a well-defined and lawful purpose of a donor or deviser, with respect to the party to be benefited thereby, the trust will be sustained, whether the *cestui que trust* be *sui juris* or not. It is as well settled in Pennsylvania that it is a lawful purpose upon part of a father to protect his bounty to a spendthrift son, both principal and interest, not only against his son's improvidence, but also against his creditors: *Fisher v. Taylor*, 2 Rawls, 33; *Brown v. Williamson*, 36 Pa. St. 338; *Rife v. Geyer*, 59 Pa. St. 395; 98 Am. Dec. 351; *Overman's Appeal*, 88 Pa. St. 276; *Eberly's Appeal*, 110 Pa. St. 95; *People's S. Bank v. Denig*, 131 Pa. St. 241; and in *Ashhurst's Appeal*, 77 Pa. St. 464, it is said that a spendthrift trust may be created as well for a woman as for a man. But it has never been held by this court that a person *sui juris* could settle his entire estate upon himself, free from liability for debts. Indeed, the very contrary has been ruled in *Mackason's Appeal*, 42 Pa. St. 330; 82 Am. Dec. 517. In that case, the trustees were to hold the estate of the settlor free and clear of his debts; to pay the net income, without anticipation, during his life, to himself; after his death, to his appointee by will, and in default of an appointment, to his heirs; and it was held that

property so settled was assets in the hands of the trustees for the payment of debts, whether contracted prior or subsequent to the execution of the deed of trust, and that the devisees or appointees under the will of the settlor were postponed to his creditors. After stating the facts, this court, in the opinion filed, says: "This statement brings us to the simple inquiry, Can the owner of property so dispose of it for his own use, benefit, and support as to put it beyond the reach of liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason therefor, excepting to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds."

The cases are not precisely similar, but in both it is clear that the design of the deed was to limit the property so that the grantor should enjoy it for life, with power to dispose of it at death, and yet that it should not be subject to the grantor's debts. The power of disposition at death is, in this case, subject to some restriction; but as this restriction is self-imposed in the deed, it is difficult to see how any distinction can be drawn which will affect the general principle involved. In both cases, not only the purpose, but the only purpose, was, that the grantor should enjoy the property, and that it should not be subject to the grantor's debts. The difference most strongly urged is, that the grantor in *Mackason's Appeal*, 42 Pa. St. 330, 82 Am. Dec. 517, was a man, whilst here the grantor is an unmarried woman; but we think no principle or present policy of the law requires any distinction, in this respect, between the sexes. It may be that if the rights of creditors had not intervened, the trust would be deemed irrevocable, and would be upheld even as against the grantor herself; but as against creditors, either prior or subsequent, the terms of the trust would not avail. In *Ashhurst's Appeal*, 77 Pa. St. 464, a trust was created by Virginia Eyre, an unmarried woman; the incomes of her estate payable to herself as the beneficiary for life, but not by way of anticipation, free from the debts, engagements, and liabilities of any husband she might have, and at her death the *corpus* of the estate to her appointee by will, with an ultimate disposition, in default of an appointment, to the persons entitled under the intestate law, as if the said Vir-

ginia had died intestate seised thereof. A bill was filed by the grantor herself, setting forth the terms of the trust, her subsequent marriage, and the death of her husband, averring that the trust was no longer active, and praying for a reconveyance. It was held, however, that as the rights of creditors were not brought in question, the trust was irrevocable, that the grantor was not entitled to a reconveyance, but that the trust must be continued.

But the policy of the law will not permit property to be so limited as to remain in the grantor for life, free from the incidents of property, and not subject to his debts: 4 Kent's Com. 311. To this extent the rule of the English cases, which is, of course, much broader, prohibiting altogether the creation of a spendthrift trust (*Brandon v. Robinson*, 18 Ves. 429; *Adams's Equity*, \*42), seems to have been retained in Pennsylvania: *Mackason's Appeal*, 42 Pa. St. 330; 82 Am. Dec. 517. But whilst in the recognition of spendthrift trusts we have departed from the English rule, there is no case in Pennsylvania which goes to the extent of recognizing a spendthrift trust, in which the grantor is himself the sole beneficiary for life, with power to dispose of the trust property at death, yet neither the income nor the *corpus* of the estate subject to his debts.

The policy of our law is otherwise, and in *Mackason's Appeal*, 42 Pa. St. 330, 82 Am. Dec. 517, it has been plainly so declared.

The judgment is affirmed.

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TRUSTS. — As to the validity of trusts providing that property shall go to a beneficiary, to the exclusion of his alienees and his creditors, see *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398, and note 404-408; *Lampert v. Haydel*, 96 Mo. 439; 9 Am. St. Rep. 358, and note; *Marshall v. Rash*, 87 Ky. 116; 12 Am. St. Rep. 467, and note. A man cannot settle his own property to his own use until a creditor shall assail it, and then over, so as to prevent the creditor from seizing it: *Loyd v. McCaffrey*, 46 Pa. St. 418.

## CURTIN v. SOMERSET.

[148 PENNSYLVANIA STATE, 72.]

**NEGLECT—PROXIMATE AND REMOTE CAUSE.**—To hold a party liable for negligence, there must be a causal connection between the injury and the negligence, and such causal connection must be uninterrupted by the interposition of any independent human agency.

**NEGLECT OF CONTRACTOR.—DEPARTURE FROM SPECIFICATIONS.—LIABILITY TO THIRD PERSON.**—A contractor who, in building a house, departs from the specifications embodied in his contract is liable to the owner for an inherent weakness in the building, by which an accident occurs after it is accepted and possession taken; but he is not liable for an injury to a third person, between whom and himself no contract relations exist.

**PRACTICE.—ERRONEOUS INSTRUCTIONS.**—Intense expressions of feeling in a judicial charge, of such nature as may seriously interfere with a calm and impartial consideration of the facts by the jury, is reversible error.

*E. Cooper Shapley*, for the appellant.

*Joseph S. Goodbread*, for the appellee.

PAXSON, C. J. The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company for the erection of a hotel building at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons—some twenty or more—having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff was injured. He brought this suit in the court below against the contractor to recover damages for the injury he thus sustained, with the result of a verdict in his favor for four thousand dollars.

Upon the trial, the defendant asked the court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant": See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is, that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and in point of fact were unknown to the company when it accepted the building from the contractor.

We must assume these allegations as substantially found by the jury, and the question arises, What is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications may be conceded. There was a contractual relation between them, and for breach of a contract not known to and approved by the company he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation; for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him the duty, — the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A is not responsible for an accident, B or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this state. The true rule, which we think applicable to it, may be found in Wharton on Negligence, 2d ed., sec. 438. It is as follows: "There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition

between the negligence and the hurt of any independent human agency. . . . Thus a contractor is employed by a city to build a bridge in a workmanlike manner, and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end to suits. But a better ground is, that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the causal connection."

In section 438, the same learned author refers to the case of a contract with the postmaster-general to furnish certain roadworthy carriages; and after the delivery of the carriages, the plaintiff is injured in using one of them, by reason of the carriage having been defectively built. "No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor; and between them, breaking the causal connection, is the postmaster-general, acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in *Winterbottom v. Wright*, 10 Mees. & W. 115. There one Atkinson contracted with the postmaster-general to provide a mail-coach to carry the mail-bags over a certain route. The driver was injured while in this service, from a hidden defect in the coach. In a suit by him against Atkinson, it was held that he could not recover, Alderson, J., saying: "The contract in this case was made with the postmaster-general; and the case is just the same as if he had come to the defendant and ordered a carriage, and had handed it at once over to Atkinson. The only safe rule is, to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

*Francis v. Cockrell*, L. R. 5 Q. B. 501, *Heanen v. Pender*, 11



Q. B. 503, *Collis v. Selden*, L. R. 3 Com. P. 495, and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by Martin, B., in *Francis v. Cockrell*, L. R. 5 Q. B. 501: "The law of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In *Losses v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action because of such injury against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In *Carrson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison to have it properly labeled, to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are sustained by the better reason. The consequences of holding the opposite doctrine would be far-reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a

boiler, piece of machinery, or a steamship,—owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.

This disposes of the case, and we would stop here, were it not that we do not wish any conclusion to be deduced from our silence in regard to the portions of the charge referred to in the fourth and fifth assignments. In these portions of the charge, the learned judge used very strong expressions in regard to the alleged departure of the contractor from his plans and specifications. When the court characterizes such departure as "gross and almost criminal negligence," and as "glaringly and knowingly" done, "for which he could have no excuse, except the desire to increase his profits," the defendant has not much chance with the jury. Such intense expressions are ill suited to a judicial charge, and may seriously interfere with a calm and impartial consideration of the facts by the jury. More than this, it was assuming the province of the jury; for the facts are for them. Were there nothing else in the case, we would reverse upon these assignments alone. We prefer, however, to place our decision upon a ground which controls the case.

Judgment reversed.

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**NEGLIGENCE—PROXIMATE CAUSE.**—In actions involving questions of proximate cause, the inquiry is based on whether or not there was any intermediate cause, disconnected from the primary cause, which produced the injury: *Bunting v. Hogsett*, 139 Pa. St. 363; *ante*, p. 192, and note.

**NEGLIGENCE—LIABILITY FOR, WHERE CONTRACT RELATION EXISTS.**—There is a difference between actions founded in negligence, where a contract relation exists, and those in which the defendant owed to plaintiff no other duty than to use ordinary care and caution: *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 19 Am. St. Rep. 475, and note; *Benton v. Trustees etc.*, 140 Mass. 13; 54 Am. Rep. 436. A company contracted with the municipal authorities of a town to supply the hydrants with water, but on account of its failure so to do, property was destroyed by fire. It was held that the company was not liable to the owners of the property destroyed: *Nicherson v. Bridgeport etc. Co.*, 48 Conn. 24; 33 Am. Rep. 1, and extensive note.

## RIEGEL v. AMERICAN LIFE INSURANCE COMPANY.

[140 PENNSYLVANIA STATE, 192.]

**EQUITY — MISTAKE — INSURANCE — REINSTATEMENT OF POLICY.** — Where a creditor holds a policy of insurance on the life of his debtor in a large amount, and ten days after his death, and while the fact is still unknown to either the insurer or the creditor, surrenders his policy and accepts a much smaller paid-up policy in lieu thereof, all parties to the exchange acting on the basis that the insured is still alive, the creditor is entitled, upon discovering the facts, to have the original policy revived and reinstated in equity, on the ground that the contract of exchange was entered into under the influence of a mutual mistake of fact.

*William W. Porter*, for the appellant.

*Henry Hazlehurst*, for the appellee.

**WILLIAMS, J.** The decree now before us was made upon the hearing of a general demurrer to the plaintiff's bill. The demurrer admitted the truth of every fact alleged in the bill, but denied that, taken as stated, the facts were sufficient to entitle the plaintiff to relief in a court of equity. To determine whether this decree was right, it becomes necessary to look into the bill, in order to ascertain what facts were set forth as the basis of the relief sought. These may be stated as follows: 1. That Jacob Riegel was in his lifetime a creditor of one Leisenring, and that to secure his claim he took out a policy of insurance on the life of his debtor, in the company against which the bill was filed, for \$6,000, paying an annual premium therefor of \$153.90; 2. That Riegel paid the premiums eight or ten years, and died, and that the plaintiff, his widow and administratrix, has continued to pay them since, down to the death of Leisenring; 3. That Leisenring died on the 10th of March, 1889, although the fact was not known at the time to Mrs. Riegel or the insurance company, nor had either known his whereabouts for thirteen years; 4. That ten days after Leisenring's death, and while the fact was yet unknown, Mrs. Riegel surrendered the policy on his life, and accepted a new policy for \$2,500, as a paid-up policy, in order to be relieved from the burden of the annual premium of \$153.90 on the first policy; 5. That in making this exchange "both parties to the transaction were acting in respect thereto on the basis that Leisenring was alive." This averment was added by amendment on the argument: 6. That when she learned that Leisenring was dead, before the exchange and the surrender of the original policy, she demanded that it be returned to her, but that the company refused to return it.

The case presented on these facts was that of a contract entered into under the influence of a mutual mistake, and a claim for relief from such contract. The mistake was in relation to the fact of Leisenring's death. Both parties evidently supposed, and acted on the supposition, that he was alive, and that the annual premiums upon his life, which had become burdensome to Mrs. Riegel, must be continued indefinitely until his death should take place. As it had become difficult for her to pay these premiums, the only way in which she could be relieved from them was to surrender her policy and accept a paid-up policy for such smaller sum as the premiums already paid would purchase. Rather than take the risk of losing the entire amount of the policy by her inability to keep up the annual payments, she surrendered her policy for six thousand dollars, and accepted in lieu of it a paid-up policy for two thousand five hundred dollars. This was the contract she made while in ignorance of Leisenring's death. At the time she made it she was already relieved from the burdensome premiums, and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies and give her absolutely nothing for it. She surrendered a policy for six thousand dollars, on which the liability of the company was already fixed, and received one for two thousand five hundred dollars to secure relief from a burden already removed. The company parted with nothing. She secured nothing. The whole transaction was a mistake, and if the decree of the court below stands, the result will be to take three thousand five hundred dollars from Mrs. Riegel, and give it to the insurance company.

These facts seem to us to present a clear and a strong case for equitable relief, so strong, indeed, that a mere statement of them is the only argument necessary for its support. The duty of a chancellor to relieve in cases of mutual mistake is so well settled that no citation of authorities can be needed. Among the more recent cases, however, in which the subject has been discussed and relief granted are *Babcock v. Day*, 104 Pa. St. 4; *Wilson's Appeal*, 109 Pa. St. 606; *Gosttel v. Sage*, 117 Pa. St. 298.

The learned judge who heard this case in the court below, and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill. He treats the arrangement made

between Mrs. Riegel and the company on the 20th of March as a compromise of a claim against the company for the alleged death of Leisenring, which Mrs. Riegel was unable to establish, because unable to show the death. As the fact of the death, and the consequent liability of the company on the policy, were uncertain, it was a case for the application of the doctrine that the adjustment of a doubtful claim constituted a valid consideration for the surrender of the policy, and the acceptance of the new one, and upon this theory the decree was entered. But it nowhere appears that Mrs. Riegel made any claim on the company, or supposed that she had any. She was asking relief from future payments of premiums on a policy on which she supposed future payments would have to be made, and to get this relief she was willing to sacrifice more than one half of the sum insured. The company was willing, in consideration of the large reduction of its liability, to give her a policy for what her payments would purchase, and relieve her in future. This is an exchange often made, and adjusted by well-settled rules. It was a compromise of nothing. We do not doubt the correctness of the rule applied by the learned judge in cases to which it is fairly applicable, but this is not one of them. The plaintiff distinctly avers that she did not know of the death of Leisenring until some days after the exchange of policies was effected, and that "both parties to the transaction were acting in respect thereto on the basis that Leisenring was alive." She distinctly avers that the object of the arrangement was to secure relief for herself from the indefinite payment of premiums that had become burdensome to her; that the new policy was accepted for that reason, and the old one surrendered, at a time when, had she known the fact, she was entitled to demand the entire sum upon which she had so long and so steadily paid the burdensome premiums. Upon these facts, if the attention of the learned judge had not been diverted from them, we feel sure that he would have reached the conclusion that we have reached, that it would be grossly inequitable to hold the plaintiff to a bargain made under the influence of a mistake of facts like that before us. This mistake the demurrer admits. If there had been any circumstance which the defendant could have set up to show that a correction of this mistake at this time would be inequitable, it should have been shown to the court by answer. If such circumstances do exist, they may yet be presented, as this

case goes back to enable the defendant to take defense upon the merits.

The decree is reversed and the record remitted, with direction that the defendant plead to or answer the complaint in the bill; the costs of this appeal to be paid by the appellee.

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**MISTAKE — EQUITY.** — Equity will not assist one party to profit by the mistake of another: *Weyant v. Murphy*, 78 Cal. 278; 12 Am. St. Rep. 50, and note. Equity has power to relieve against mutual mistakes of parties to contracts in writing: *Benson v. Murkoe*, 37 Minn. 30; 5 Am. St. Rep. 516; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Worsley v. Burlington etc. Ins. Co.*, 74 Iowa, 484. Affirmative or defensive relief may be granted against a mistake of fact which is a material element in the transaction, and which is not the result of the party's own violation of some legal duty: *Thwing v. Hall etc. L. Co.*, 40 Minn. 184.

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## PUTNAM NAIL COMPANY v. DULANEY.

[140 PENNSYLVANIA STATE, 205.]

**TRADE-MARKS — IMITATION OF UNPATENTED ARTICLE — INJUNCTION.** —

The manufacture and sale of an unpatented article, made in exact imitation of another manufacturer's product, will not be enjoined, in the absence of allegation and proof of a trade-mark. The brazing of horseshoe nails does not of itself constitute a trade-mark or patent.

*Owen Wister, Francis Rawle, and S. G. Fisher*, for the appellant.

*Albert B. Weimer and Frederick M. Leonard*, for the appellee.

PAXSON, C. J. The court below sustained the defendant's demurrer, and dismissed the plaintiff's bill. It was evidently intended as a trade-mark bill. Yet the case lacks every element of a trade-mark. There is no trade-mark shown nor alleged which it is charged the defendant has pirated. On the contrary, the bill alleges that the plaintiff manufactures a peculiar kind of horseshoe nail. It is known to the trade as a bronzed nail, being covered with a coating of bronze. It is not alleged they are any better for being bronzed, but they are more popular, and sell more readily. The bill charges that the defendant is selling a precisely similar nail; that it is bronzed like those of plaintiff's, to deceive purchasers and induce them to purchase them as plaintiff's nails. The defendant has not imitated its label, for it has none. He has not even imitated the plaintiff's manner or style of putting

up its packages. There is nothing beyond the mere averment that he makes a similar nail.

We have never yet carried the doctrine of trade-marks to the extent claimed for it by the plaintiff. We have never hesitated to restrain the imitation of a trade-mark when the facts justified it. We are now asked to go one step further, and protect the manufacture of the article itself. This we do not see our way clear to do. The manufacture of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufactures. A man may make any article he pleases that is not protected by a patent. He may make a horseshoe nail, or any other unpatented article, precisely like that of any other manufacturer; he may imitate it so perfectly that the one may be mistaken for the other, but he may not sell his own article as and for that of another, by means of a trade-mark in imitation of the trade-mark of such other person. Some of the cases cited go so far as to restrain one manufacturer from imitating the style, form, and size of the packages of other manufacturers. We need not discuss these cases, as they are not applicable. Our attention has not been called to any case which is authority for plaintiff's claim. We think judgment was properly entered for the defendant upon the demurrer.

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

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**TRADE-MARKS, WHAT CONSTITUTE:** See *Alf v. Radam*, 77 Tex. 530; 19 Am. St. Rep. 792, and note. A trade-mark is a name or device which is used to indicate the origin and ownership of the thing or article to which it is applied: *Foster v. Blood Balm Co.*, 77 Ga. 216; *Laughman's Appeal*, 128 Pa. St. 1; *Kochler v. Sanders*, 122 N. Y. 65.

**UNPATENTED ARTICLES OR COMPOUNDS.** — There can be no exclusive right to the use of formulas for the manufacture of medicines: *Chadwick v. Covell*, 181 Mass. 190; 21 Am. St. Rep. 442, and note. Compare *Peabody v. Norfolk*, 36 Mass. 452; 96 Am. Dec. 664, and note 669, 670.

## ESTATE OF JACOBS.

[140 PENNSYLVANIA STATE, 253.]

**WILLS — DISINHERITANCE OF HEIR.** — An heir at law can only be disinherited by an express devise or by necessary implication, and such implication must amount to such a strong probability that an intention to the contrary cannot be supposed.

**WILLS — CONSTRUCTION — LAND MAY PASS AS MONEY.** — Where it appears from a will that the testatrix did not intend to die intestate as to any part of her estate, and that she did not intend her heirs at law to take any benefit under the will, or to have any share in her estate, and that she used the word "money" as the equivalent of property, land acquired after the execution of the will will pass to the residuary legatee under a bequest of "the remainder and residue of my money," to the exclusion of her heirs at law.

*R. C. McMurtrie and A. S. Ashbridge, Jr., for the appellants.*

*Henry Pleasants, Jr., Alfred P. Reid, William T. Barber, Hampton L. Carson, R. Jones Monaghan, and J. Frank E. Hause, for the appellee.*

PAXSON, C. J. The question here is, whether the real estate of the testatrix passed under the residuary clause of her will. At the time it was executed her property consisted only of personal estate. At the time of her death she was seised of real estate amounting in value to nearly as much as her personal estate. After giving several pecuniary legacies, and one or more specific legacies, she disposed of her residuary estate as follows: "The remainder and residue of my money I give and bequeath to the Hospital of the Protestant Church in Philadelphia." There is no mention of real estate in the will, which may be accounted for by the fact, before stated, that when she executed it she owned none, nor did she for some years thereafter.

There are two funds for distribution, — the one arising from the conversion of the personal property, and the other from the sale of the real estate. The latter was claimed for the heirs at law, upon the ground that it did not pass by the will, and that as to such real estate the testatrix died intestate. It is further to be observed that at the time the will was made she had sufficient personal estate to pay all the legacies, but that by reason of her purchase of the real estate the personal estate was so much diminished that it will only pay about fifty per cent of such legacies.

It was said by Justice Rogers, in *Bender v. Dietrick*, 7 Watts & S. 284: "It is a maxim which applies here, as well as in



England, that an heir at law can only be disinherited by express devise or necessary implication; and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed." This is the rule which must govern this case. There are two things which can be gathered from this will with reasonable certainty. They are: 1. That the testatrix did not intend to die intestate as to any portion of her estate; and 2. That she did not intend her heirs at law to take any benefit under her will, or to have any share of her estate. The first proposition appears from the fact that she disposed of all the estate which she possessed at the time the will was made, the residuary clause being sufficient to carry all that remained after payment of the legacies. The second proposition is manifest from the fact that she excluded her heirs by the terms of her will from any participation in her estate, excepting in so far as she has given them small pecuniary legacies.

What, then, did the testatrix intend by the residuary bequest of the "remainder and residue of my money"? The word "money" literally means cash; and if we adopt this interpretation, nothing passed by this clause. It was conceded, however, that this word was the equivalent of property. It was contended by the appellant that it included only moneyed securities, and perhaps other personal estate. That the word "money" is popularly known and used as indicating property of every description is well known. Thus it is very common to refer to a person as a "moneyed man" because of his large possessions. Yet those possessions may consist exclusively of real estate. It appears very plain to us that this testatrix used the word "money" in its popular sense, as the equivalent of property, and that she intended all her estate to pass by the residuary clause. She knew of what her estate consisted when she made her will. She knew it would satisfy all the pecuniary legacies, and leave a small residue; and if we construe the will as of the time of her death, it is most unlikely she intended the legacies she had given to those who were evidently the first objects of her bounty should be cut down by one half, in favor of her heirs at law, whom she never intended to derive any benefit from her estate. We are not considering the case of an attempt to charge real estate because of a deficiency of the personal estate to pay the legacies, and where the same are not charged upon the land. Were such the case, a discussion of some of the authorities cited might be

come necessary. On the contrary, we are dealing with the question of the intent of the testatrix to pass her entire estate under the name of money. A careful consideration of the will, gathered from within its four corners, leaves no doubt in our minds that she intended all her property to pass by the residuary clause, and to disinherit her heirs at law.

The decree is affirmed and the appeal dismissed, at the costs of the appellants.

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**WILLS — DISINHERITANCE OF HEIR.** — An heir cannot be disinherited, unless the estate is given to some other person or persons: *Coffman v. Coffman*, 85 Va. 459; 17 Am. St. Rep. 69, and note. To disinherit a child whose name is omitted from a will, an intention so to do must appear from the words on the face of the will indicating such intent, directly or by implication: *Estate of Stevens*, 83 Cal. 322; 17 Am. St. Rep. 252, and note. Under the Iowa code, an heir to whom nothing is devised takes nothing: *Stennett v. Hall*, 74 Iowa, 279.

**WILLS — CONSTRUCTION OF WORD "MONEY."** — Money is a generic term, and covers everything which, by consent, is made to represent property: *Crutchfield v. Robins*, 5 Humph. 15; 42 Am. Dec. 417, and note. Where a testator, after giving various legacies, gave "the balance of my money" to his mother, the gift included all the residue of his estate, both real and personal: *In re Miller*, 48 Cal. 165; 17 Am. Rep. 422. But see *Mann v. Mann*, 14 Johns. 1; 7 Am. Dec. 416. Compare *Tolar v. Tolar*, 3 Hawks, 74; 14 Am. Dec. 575, and note 576-578, as to what words used in a will may pass real property. A general residuary clause includes any property or interests of the testator not already disposed of: *Riber v. Cornwall*, 113 N. Y. 115; *Little v. Giles*, 25 Neb. 314; *West v. Randle*, 79 Ga. 23.

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## CROUSE v. MURPHY.

[140 PENNSYLVANIA STATE, 335.]

**JUDGMENTS — OMISSION OF INITIAL IN NAME FATAL TO LIEN.** — The omission of the middle initial of the name of a judgment debtor on the index of judgments is fatal to the lien of the judgment creditor, as against a subsequent *bona fide* grantee of such judgment debtor for value and without notice, who has searched the judgment record for the name under which his grantor held and transferred title.

*J. B. Colahan, Jr., and John G. Johnson*, for the appellant.

*Henry T. Dechert and Henry M. Dechert*, for the appellees.

**WILLIAMS, J.** The intention to protect an innocent purchaser against secret liens and conveyances manifested itself very early in this state. An act of the colonial legislature, passed in 1772, made it the duty of "any judge or other officer of a court of record within this province, that shall sign any

judgments," to enter the date of signing on the margin of the record, and declared that the lien of the judgment thereafter should begin at that date, instead of extending, by relation, to the first day of the term or the return of the original writ. Three years later it was made the duty of purchasers to record their deeds within six months, and if they failed to do so, their unrecorded deeds were to be held fraudulent and void against subsequent *bona fide* purchasers and mortgagees. Prior to 1775 there was no duty to record resting on purchasers, and one buying land was bound to investigate the title at his peril: *Macclay v. Work*, 5 Binn. 154. In 1798 the duration of the lien of a judgment upon the defendant's land was limited to five years, unless duly revived. The act of 1849 made it the duty of the plaintiff to take notice of a sale of land by his debtor, and provided that, as to a purchaser, the lien of the judgment should be discharged, unless such purchaser was warned by *scire facias* within five years after he placed his deed upon the record, notwithstanding the judgment may have been regularly revived against the defendant. To facilitate searches, separate judgment dockets were provided for in 1827, and our present system of lien dockets as judgment indexes was adopted in 1856. The act provided "that the lien of a judgment shall not commence or be continued against any purchaser or mortgagee unless the same be entered in the county where the real estate is situated, in a book to be called the judgment index, . . . and the plaintiff shall furnish the proper information to enable the prothonotary to prepare said entry." Among other things, the entry must show the names of the parties against whom a lien is entered. The purchaser is bound to take notice of liens appearing on the judgment index, but he is not bound to look beyond it; and if his search discloses the existence of no lien entered there against his vendor, he may complete the transaction and pay over the purchase-money in safety. Upon this general proposition there is no difference of opinion. The question presented is, Through what modifications must one who proposes to become a purchaser pursue the name of his vendor?

In the case now before us, one Daniel J. Murphy owned a lot of land at the corner of Myrtle and Holley streets, in the city of Philadelphia. His deed for the same was regularly recorded, as was a mortgage given by him for part of the purchase-money. He took and he encumbered the title in his

proper name as Daniel J. Murphy. Roggenmoser desired to buy the lot. He found the title properly recorded, and encumbered by a mortgage. Turning from the recorder's office to that of the prothonotary, he caused search to be made for liens on the judgment index against Daniel J. Murphy, and found none. He then completed his purchase, settled the purchase price, and received and recorded his deed. This was in 1888. In June of that year, Murphy went to Chicago to reside. In 1889 the plaintiff, who had a judgment against Daniel Murphy, issued his writ of *scire facias*, and served Roggenmoser as terre-tenant.

Was the judgment against Daniel Murphy a lien on the lot? It is admitted that Daniel Murphy and Daniel J. Murphy are the same person. It is clear, therefore, that real estate in the hands of that person would be bound. Having signed his name in the form in which it appears on the judgment index, he could not object to the enforcement of the judgment against his property. As between him and his creditor, it is a question of personal identity. But the defendant is not objecting. It is a purchaser who bought after a search of the records, and with no actual notice of the existence of this judgment, who claims protection. If he did all the law required of him, he is entitled to protection against the judgment of the plaintiffs. If he did not, then he must suffer for his want of care in making the search.

The plaintiffs contend that he was bound to take notice of this judgment, because it was a lien against his vendor, and could have been enforced against the land in his hands. It appears in the case stated that Murphy, in the transaction of his business, used his name in various forms. On his sign it was D. Murphy. He gave some notes as Dan Murphy, some as Daniel Murphy, and it is clear that he took and conveyed title as Daniel J. Murphy. In the city directory it appeared, at and for years before the sale to Roggenmoser, as Daniel J. Murphy. If a judgment had been entered on a note signed "Dan Murphy," and on another signed "D. Murphy," there is no reason that can be urged in support of the lien now before us that could not with equal force be urged in support of the lien of both the others. All were signed by the same man, and were for debts due by him. If the creditor has no duty resting on him, but is to be protected because Daniel J. Murphy was his debtor in fact, notwithstanding he did not put his name correctly to the note, then all the forms of the

name used in signing the notes stand on the same ground. In order to see the practical operation of such a holding, we have looked into the city directory, and find the name of Daniel Murphy, with various middle letters, and without any, occurs twenty times. But "D" is the initial of David, Dennis, and many other first names besides Daniel. To exhaust the possibilities as to D. Murphy would require searches running into the hundreds.

But without laying too much stress on the argument *ab inconvenienti*, or the apparent legislative intent, let us glance at our cases bearing upon this question. In several cases,—among which are *Ridgway's Appeal*, 15 Pa. St. 177; *York Bank's Appeal*, 36 Pa. St. 458; and *Smith's Appeal*, 47 Pa. St. 128,—it has been held that a lien entered in the last name of the defendant is not a lien on the real estate of the defendant in the hands of *bona fide* purchasers. For example, a lien entered against the firm of McFall and Martin does not bind the separate real estate of the partners in the hands of purchasers because of the absence of the first names of McFall and of Martin. Not only must the first name appear, but it must be correct; for in *Zimmerman v. Briggans*, 5 Watts, 186, the judgment was entered on a bond. The bond was signed, Jacob Briggans, which was the true name of the obligor. The prothonotary made a mistake, and entered the name in the lien docket as John Briggans. An examination of the files would have shown the mistake, but this court held that subsequent creditors were not bound to go beyond the lien docket, and postponed the judgment, because of the mistake in the first name. It is not enough that names are *idem sonans*. In *Heil's Appeal*, 40 Pa. St. 453, the true name of the defendant was George P. Yoest. It was entered on the index against George P. Joest. The first name was right. The last name was *idem sonans* with the right name of the defendant, but it was held that the purchaser had no notice of the lien from the record. The reason evidently is, that the record addresses itself to the eye, and not to the ear alone. The purchaser was bound to look under the letter "Y," which was the initial letter of his vendor's name. Not finding a lien there, he was not bound to go further, and the lien was postponed. But in *Wood v. Reynolds*, 7 Watts & S. 406, our precise question was decided. A note was signed by John M. Gruver. By some oversight of the prothonotary the "M" was omitted, and the lien entered against

John Gruver. A purchaser from John M. Gruver made search for liens against his vendor, but found none, and completed his purchase. We held that he had done all that was required of him, and that the judgment could not be enforced against the land in his hands. This case was followed in *Hutchinson's Appeal*, 92 Pa. St. 186, and the rule distinctly laid down, that "the omission of the middle letter in a name on the judgment index is fatal to a lien," as against *bona fide* purchasers.

From this review of the cases it will be seen that the rule was well settled in this state when the case of *Jenny v. Zehnder*, 101 Pa. St. 296, came before this court. In that case a different rule was adopted, which is wholly inconsistent with *Wood v. Reynolds*, 7 Watts & S. 406, and *Hutchinson's Appeal*, 92 Pa. St. 186; and *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534, is cited as authority for it. An examination of the latter case will show that it does not sustain the rule laid down in *Jenny v. Zehnder*, 101 Pa. St. 296, nor afford it any aid whatever. The case was this: One John Bubb executed a judgment note. The prothonotary of Lancaster County entered judgment upon it against John Bobb. This judgment was held to be notice because the two names are identical. They are different modes of spelling the same name, and, as was said by the court, are *idem sonans*, at least in the German counties, of which Lancaster is one. The name was found under the proper title in the index, with the correct first name, and with a variation in spelling in the middle letter, which made no change in the name as spoken. Similar instances are the names of Kopp and Kupp, and of Kolp and Kulp, which are merely different forms of the same name, with the same initial and the same pronunciation.

It is to be regretted that *Wood v. Reynolds*, 7 Watts & S. 406, and *Hutchinson's Appeal*, 92 Pa. St. 186, had not been considered in *Jenny v. Zehnder*, 101 Pa. St. 296. The learned judge of the court below followed the last case faithfully, but we feel constrained to say, what he could not, that we prefer and shall follow the old and well-settled line of cases to which we have referred. The rule of *Wood v. Reynolds*, 7 Watts & S. 406, is not only most in harmony with the spirit of our legislation and with our own decided cases, but it is equitable in its operations. Murphy's title was on the record. Whoever dealt with him on the credit of his real estate was bound to know what appeared in his recorded title. It was as much

the duty of one who was about to trust him with money or goods, because of his ownership of land, to know how and by what name he held it, as it was the duty of one about to purchase the land to make the same inquiries. If the creditor neglected his duty, he must lose in consequence. If the purchaser neglected his, he must lose. Because the creditor in this case did neglect to examine the record, he has a note signed with only part of the maker's name, on which judgment has been entered. With no notice of the habit of his vendor to sign notes in several different ways, and with no means of notice of liens but the record, the purchaser examined, exhausted the means of knowledge within his reach, and finding no lien against Daniel J. Murphy or D. J. Murphy, settled with his vendor, and took his deed. If one of these parties must lose, in good conscience it should be he whose neglect to avail himself of the information which the record could have given him made the loss by one or the other inevitable.

The judgment is reversed, and judgment is now entered in favor of the defendant upon the case stated.

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**JUDGMENTS — OMISSION OF INITIAL IN RECORD FATAL TO LIEN OF.** — The record of a judgment against William Mankedick is not constructive notice to a purchaser in good faith of real estate of which H. W. Mankedick is the remote grantor that the judgment is against H. W. Mankedick, and a lien upon the land: *Johnson v. Hess*, 126 Ind. 238. Compare note to *Cham v. Sims*, 21 Am. Rep. 181, and note to *Fallon v. Kehoe*, 29 Am. Dec. 350.

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## ESTATE OF SMITH.

[40 PENNSYLVANIA STATE, 34.]

### **TRUSTS — RIGHTS OF BENEFICIARIES — BEQUEST OF CORPORATE STOCK. —**

When corporate stock is by the will of a decedent given in trust, the income thereof for the use of the beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which have not been divided until after his death, belong to the *corpus* of his estate. The dividends of earnings made after his death are income, payable to the life tenant, whether they are cash, scrip, or stock.

### **TRUSTS — RIGHT OF BENEFICIARIES — BEQUEST OF CORPORATE STOCK. —**

When corporate stock is bequeathed in trust, the income thereof to be paid to a beneficiary for life, with remainder over, the profit of a sale of new stock issued after the testator's death, in lieu of corporation profits applied to the improvement of the corporate property in the testator's lifetime, is capital, and not income, and belongs to the *corpus* of the estate.

**TRUSTS — REQUEST OF CORPORATE STOCK — EVIDENCE OF VALUE.** — Where corporate stock is bequeathed in trust to pay the income to a beneficiary for life, with remainder over, the actual value of the stock as ascertained from the value of the corporate assets at the testator's death, and not the fluctuations of the stock market, must control in determining whether new stock issued subsequent thereto, in lieu of profits applied to the improvement of the corporate property prior thereto, represents capital or income. In such case, evidence of the market value of the stock is only admissible so far as it may aid in ascertaining the actual value.

*George Tucker Bispham*, for the appellant.

*John Marshall Gest and Edwin Saunders Dixon*, for the appellees.

**CLARK, J.** The question in this case arises upon the adjudication of the account of Alfred and Horace T. Smith, trustees under the will of Stephen Smith, deceased, who died in October, 1884. By his will the testator gave a portion of his estate, in trust, to pay the net income to his son Alonzo Smith, free from his debts, for life, with remainder over to his children, etc. Included in this part of his estate were fifty-six shares of the capital stock of the Frankford and Southwark Passenger Railway Company. The whole capital stock of the company was \$750,000; that is to say, 15,000 shares, of the par value of \$50 per share. On the 4th of December, 1888, however, it was agreed at a meeting of the stockholders to issue 5,000 additional shares, at the par value of \$50 per share, the existing stockholders, as they were registered on the 2d of January, 1889, to have the right, at any time before the 2d of February thereafter, to subscribe one share for every three of their respective holdings on the day designated.

The trustees of Stephen Smith's estate exercised the privilege, and bought eighteen shares for \$900, which, for the time, they borrowed from the income fund in their hands; but in their account they have made good the income, and have treated this sum as so much taken from the capital. On the 18th of February, 1889, the directors declared a dividend of \$11 per share on the whole 20,000 shares. This dividend was made exactly to cover the price of the extra shares, less the state and city taxes, as follows:—

|                                            |           |
|--------------------------------------------|-----------|
| Subscription to 5,000 shares, at \$50..... | \$250,000 |
| Less state and city taxes, about.....      | 30,000    |
|                                            | <hr/>     |
|                                            | \$220,000 |
| Dividend 20,000 shares, at \$11 ..         | \$220,000 |



In the mean time, on the 12th of January, 1889, Alonzo Smith, the life tenant, died, leaving to survive him two children, Laura M. and Mary E. Smith; both of whom were minors. The appellant, Alfred Percival Smith, is the administrator of his estate, and the appellees are the guardians of his children. The dividend on the seventy-four shares yielded to the estate \$814; it was declared after the decease of Alonzo Smith, and was applied to those entitled in remainder. Upon a sale of the eighteen shares, the profit realized was \$3,870, and the trustees accounted for this as capital. To this method of accounting the administrator of Alonzo Smith's estate excepted, claiming that this sum must be treated as income, and, as such, that it constituted part of the assets of that estate. The auditing judge, as well as the orphans' court, held the \$3,870 to be capital, and not income, and this is the error assigned.

The appellant's contention is, that accumulated profits, when distributed as dividends, belong to the holder of the stock at the time of the distribution, although they may have been earned during a prior ownership, a share-holder having no absolute right to such profits before a declaration of a dividend thereof. But it is well settled in this state that when the stock of a corporation is by the will of a decedent given in trust, the income thereof for the use of a beneficiary for life, with remainder over, the surplus profits, which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the *corpus* of his estate; whilst the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash, or scrip, or stock.

The leading case in Pennsylvania is *Earp's Appeal*, 28 Pa. St. 368. The residuary estate of Robert Earp, who died in November, 1848, embraced stock in a manufacturing company upon which large surplus profits, over and above the current dividends, had accumulated both before and after his decease. In July, 1854, the capital stock was increased from \$200,000 to \$500,000, by creating 6,000 additional shares of \$50 each, which were paid for out of the accumulations. At the testator's death, these surplus profits were near \$300,000; when the stock issued, they had increased to \$700,000. The market value of the stock at his death was \$125 per share; when the new stock issued, its value was \$80,

but the number of shares belonging to the estate was 1,350, instead of 540. As the new shares were therefore in part paid from the surplus existing at the death of Robert Earp, and partly from the accumulations after his death, they were properly apportioned between the life tenant and those entitled in remainder. It was held,—1. That the surplus profits accumulated at the death of the testator, as respects the estate, were essentially part of the stock itself, and were subject to the trusts in the will as so much principal; and 2. That the accumulations after his decease, when they come to be divided, are income in like manner as the current dividends, and therefore belong to the life tenant, no matter whether the division or distribution thereof be in cash, or scrip, or stock. “In the case before us,” said the chief justice, “the testator has not made a bequest of the stock itself to the appellants; on the contrary, he has given them only the income of it for life. Their interests commence after the death of the testator. They have no right whatever to claim the income which had accumulated before his death. . . . It is equally clear that the profits arising since the death of the testator are income, within the meaning of the will, and should be distributed among the appellants.”

*Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, distinctly recognizes the doctrine and authority of *Earp's Appeal*, 28 Pa. St. 368; but as the facts were different, a somewhat different result ensued. *Earp's Appeal*, 28 Pa. St. 368, differs from *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, in this: In the former, the new issue of stock was paid for entirely from the surplus profits. There was an actual distribution of profits, as profits, in the form of stock,—profits which had accumulated both before and after the testator's death; whilst in *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, there was merely a right to subscribe and pay for new shares at their per value, and it did not appear what, if any, portion of the existing surplus was accumulated after the death of Henry Lazarus, or that the value of the stock had advanced after that time until the new stock was issued. No profits were declared or distributed; the stock was purchased at a price, the object being, not to divide profits as such, but to increase the capital. The right to subscribe for shares was, we think, an interest attaching to the stock, and neither the amount received from the sale of that right, nor the stock purchased with the proceeds, can, under the facts of that case,

be considered as a product or profit for the life tenant. The par value of the stock, as we have said, was \$100, but it had a market value of \$240; it turned out, however, that the new issue of shares depreciated the shares to \$170. It required the addition of the forty new shares to the old to maintain the integrity of the investment. One hundred shares at \$240 were worth \$24,000, whilst 140 shares at \$170 were worth only \$23,800; so that in fact there was no profit. Our brother Paxson, in the opinion, says: "It requires but a cursory examination of this transaction to show that no profit has been made, except upon paper. As before observed, the corporation had declared no profits, and distributed none. It merely allowed the holder of each share of the old stock to subscribe for a corresponding share of new stock and to pay the company the par value thereof. . . . If the company had gone into liquidation the day before the issue of the new stock, the 100 shares of original stock would have realized \$24,000; if it had gone into liquidation the day after, the 140 shares would have realized nearly the same sum. Where, then, was the profit?"

*Biddle's Appeal*, 99 Pa. St. 278, is in line with *Moss's Appeal*, 83 Pa. St. 284; 24 Am. Rep. 164. There was no division of surplus profits, or of earnings accumulated either before or after the death of the testatrix, Mary Condry, deceased; the transaction was simply an increase of stock to the stockholders, upon payment of the price at par, and ten dollars per share additional to go to the surplus fund. The market value of the old stock was not shown to have varied between the testatrix's death, on the 29th of June, 1880, and the issuing of the new stock, on the 15th of November, 1880, and but a very slight diminution took place after the issue; there was, however, a loss in the intrinsic value to the amount of seventy-five cents per share. Instead of subscribing for the new stock, the executor sold the privilege, and the question was, whether the sum realized should be treated as income or principal. In the opinion filed, this court said: "The entire value of the stock, with all its incidents, at the death of the testatrix constituted the principal of the estate. On this principal the appellant was entitled to the income. Whatever value beyond par the stock then had by reason of the large surplus fund of the company, or otherwise, attached to the stock and formed a part of the principal. The appellant was not given any part of this aggregate value of the stock; the income therefrom was all she

was entitled to receive. Whatever was capital must remain capital. . . . It is not shown that the stock was of greater value on the 15th of November than on the day of the death of the testatrix, nor that the surplus fund had been increased in the mean time. . . . The distinction between the surplus fund, existing at the time of the death of the testator, and a fund accumulated afterwards, is distinctly recognized in *Earp's Appeal*, 28 Pa. St. 368. That which had accumulated before the death of the testator was held to be part of the principal of the fund, and that which accumulated after his death to be income."

The same rule is recognized, with special reference to *Earp's Appeal*, 28 Pa. St. 368, as authority, in *McKeen's Appeal*, 42 Pa. St. 479; in *Vinton's Appeal*, 99 Pa. St. 434; 44 Am. Rep. 116; and in *Philadelphia Trust Co.'s Appeal*, 24 Week. Not. Cas. 137; 1 Mona. 230. The last case bearing upon this question is the very recent one of *Oliver's Estate*, 136 Pa. St. 43; 20 Am. St. Rep. 894. The contest there, as here, was between the life tenant and the remainderman, and the question whether the fund in the hands of the trustees was income or principal was settled in harmony with *Earp's Appeal*, 28 Pa. St. 368, which is referred to as establishing the rule in this state.

*Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585, in no way collides with the ruling in *Earp's Appeal*, 28 Pa. St. 368. It may perhaps be to some extent inconsistent with *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, or *Biddle's Appeal*, 99 Pa. St. 278, but it is in full accord with the well-settled rule that the life tenant is entitled to the income accruing after the death of the testator, and that surplus profits accruing in his lifetime, when they come to be distributed, are principal, and not income. As the court said in *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, that case must stand upon its own peculiar facts. It may be distinguished, if at all, from the cases mentioned, in this, that in the increase of the stock there was no impairment of either the actual or the market value of the shares.

From this hasty review of the cases it will be seen that the ruling in *Earp's Appeal*, 28 Pa. St. 368, has for more than the third of a century been steadily maintained without modification or change; in no subsequent case, we believe, has its authority been doubted, its practicability questioned, or the soundness of its doctrine impeached. It has not only been

adhered to in this state, but it has been adopted and followed in nearly all of the states. It is referred to in the text-books as the Pennsylvania rule; but, as remarked by Mr. Cook, in his very recent treatise on stocks and stockholders, sec. 554: "Inasmuch as it obtains in every state of the Union, excepting Georgia and Massachusetts, it might well be called the American rule." The rule which prevails in Massachusetts and Georgia is to regard cash dividends, however large, as income, and stock dividends, however made, as capital: *Minot v. Paine*, 99 Mass. 101; 96 Am. Dec. 705; whilst the English rule is, that the intention of the corporation to declare a dividend, as such, is to govern, and therefore the ordinary or current dividends are regarded as income, and extraordinary dividends as belonging to the *corpus*; it matters nothing, in either case, whether the dividend be of cash, or stock, or property: See Cook on Stocks and Stockholders, sec. 556, and cases there cited. It must be conceded, we think, that whilst the Pennsylvania rule may, in some cases, perhaps be more difficult in its application, when properly applied it arrives at results which are absolutely just, and secures to the life tenant, and to those entitled in remainder, precisely what they of right are entitled to have, and this cannot be said of the practical operation of any other rule.

The appellant asks us to depart from this well-settled and salutary rule. His contention is, that, as a share-holder has no absolute right to profits until a dividend thereof is declared, the ownership of profits, as between a life tenant and a remainderman, is in the person who is entitled to dividends at the time of the distribution, although they may have been earned during a prior ownership. "Therefore, in this case," he says, "even if the profits for which this stock is issued were earned prior to the estate of the life tenant, yet, being expended with the consent of the stockholders for betterments, they did not vest as earnings, and there was no absolute right to them until the amount had been declared as a dividend; and such amount, by the analogy of an assignor and assignee of stock, would in this case belong to the life tenant." To adopt such a conclusion would be to overrule the whole line of Pennsylvania cases to which we have referred, and to adopt a method of distribution which wholly ignores the rights of the parties, and defeats the just and clear purpose of the testator; for it is perfectly plain that the value of the stock at the testator's death was composed in part of these

accumulated profits. If the trustees, in order to change the investment, had at the testator's decease sold the shares, they would have received their value as affected by the surplus then undivided, and the amount received would, in that case, have been the principal upon which the life tenant would be entitled to receive income. Upon what principle of justice, then, should the act of the corporation, over which the parties had no control, be allowed to affect their rights by taking from the remaindermen that which clearly belongs to them, and handing it over bodily to the life tenant?

The original capital of the company was seven hundred and fifty thousand dollars; the new stock increased this to one million dollars. The cost of construction and equipment of the road represented about one million and twenty thousand dollars. The testator died in October, 1884; on the 1st of January following, the assets were \$1,118,147.50, and on the 1st of January, 1889, which was the day before the stock issued, the assets were \$1,126,344.53. It is certain, then, that the profits of the business were, to the amount of the new stock, applied to betterments, and were actually thus capitalized in the testator's lifetime. Under the Pennsylvania rule, therefore, when they come to be distributed, they should go to principal, and not to income.

As remarked by the auditing judge: "The whole effect of the transaction in dispute was to enable the owners of the original shares, among whom are the parties in remainder, to realize upon their holdings what the shares were actually worth. It went upon the theory that the share-holders owned all the property of the corporation, but their stock did not properly set forth that ownership, and to the extent that it failed to represent the full value of such ownership it was unavailable. By the new issue the whole capital was made marketably available. It worked no injustice to the life tenant; he got a dividend on new shares as on the old, and he was better off than before."

It is true, the market value of the shares was not greatly, if any, impaired by the increase, but the question of value is to be determined, not by the fluctuations of the stock market, but by the actual assets held by the corporation: *Mess's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164; *Biddle's Appeal*, 99 Pa. St. 278. It is the intrinsic value of the shares, to be ascertained from the amount and value of the assets at the death of the testator, and at the time of the increase of the

stock, which governs in the apportionment of the surplus profits. The market value may aid in the ascertainment of the actual value, and is therefore properly received in evidence on that issue: *Barp's Appeal*, 28 Pa. St. 368; *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164. In the latter case, however, it was said that the market value represented the actual cash assets in the hands of the company. We are of opinion that this case was correctly decided, and the decree of the orphans' court is affirmed, and the appeal dismissed, at the cost of the appellant.

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**STOCK — DIVIDENDS — INCREASE OF CAPITAL — LIFE TENANT AND REMAINDERMAN.** — Where a will bequeathed capital stock in trust, the dividends to be paid to a certain party for life, with remainder over, and the capital stock of the corporation is increased from its earnings, such increase goes to the remainderman, and the life tenant has no interest therein: *Gibbons v. Mahon*, 4 Mackey, 130; 54 Am. Rep. 262, and extended note; *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164, and note; *Rand v. Hubbell*, 115 Mass. 461; 15 Am. Rep. 121. An increase of the capital of a corporation should be kept for the remainderman, and an increase of the income should be paid the life tenant: *Mines v. Paine*, 99 Mass. 101; 96 Am. Dec. 706, and note. See *Oliver's Estate*, 136 Pa. St. 43; 20 Am. St. Rep. 894, and note. Where one is entitled to the interest on stocks during his life, the interest that has accrued thereon at the time of his death goes to his representative, and not to the remainderman: *Chapman v. Chapman*, 87 Ky. 140.

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## ESTATE OF HAUER.

[120 PENNSYLVANIA STATE, 436.]

**HUSBAND AND WIFE — GIFT OF RENTS BY WIFE TO HUSBAND — PRESUMPTION — EVIDENCE.** — A wife who, for a period of years, permits her husband, with her knowledge, and without objection, to receive and use as his own the rents of her separate property, cannot, at his death, recover them from his estate, without proof of an understanding that he was to account for them, sufficient to overcome the presumption that they constituted a gift to the husband and were used by him in maintaining the family.

*Gustavus Remak, Jr., John A. Coyle, J. Hay Brown, and W. U. Hensel*, for the appellants.

*George Nauman*, for the appellee.

**MCCOLLUM, J.** The single question presented by this appeal is, whether a wife who, for a period of ten years or more, permits her husband to receive and use as his own the rents of her separate property, can, at his death, recover them from

his estate, without proof of an understanding that he should account for them.

It is well settled that a husband who receives any portion of the principal of his wife's separate estate becomes, in the absence of an agreement controlling his reception of it, her debtor for the amount so received, but he is not, as a general rule, chargeable with interest upon it. It lies on him to show the agreement which relieves him from the payment of the principal, and on her to show the agreement which entitles her to interest, but the agreement, in either case, may be implied from the circumstances attending the transaction. Prior to the act of April 11, 1848 (P. L. 536), a husband was not required to account to his wife or her legal representatives for the rents of property settled to her separate use, if he received them with her knowledge and approval, and without any understanding that he should hold them in trust for her. In such case, the presumption was, that the rents were used in the maintenance of the family, and that the wife intended a gift of them to the husband for that purpose.

In *McGlinsey's Appeal*, 14 Serg. & R. 64, Chief Justice Tilghman said: "It is a general principle that where the wife permits her husband to receive the profits of her separate estate, and particularly where they live together, and the expenses of housekeeping are paid by him, the presumption is, that it was the intention of the wife to make a gift of the profits to the husband. And there is great reason for this presumption, because the husband, being in receipt of this money, may be induced to live at a greater expense than he would otherwise have done, whereby the comforts of his wife as well as his own are increased. To call him to account, therefore, after the lapse of a number of years, might be ruinous, and would certainly be unjust." The law on this subject was clearly stated by Mr. Justice Kennedy, in his charge at *nisi prius* in *Towers v. Hagner*, 3 Whart. 48, as follows: "Now, according to the legal effect of the agreement made between Captain Towers and his wife, . . . Mrs. Towers continued to be the owner in equity of her estate, the same after marriage as before. Her husband had no right whatever to her money, nor to the rents or profits of her real estate; all still belonged to her, and she had an unquestionable right to dispose of them as she pleased. . . . If Captain Towers received any of her rents without her consent or authority, he would be bound to account for it, and pay it to her. If, however, he received her



rents by and with her consent, while they lived together in peace and harmony, and used them without any complaint or objection being made by her for years, the presumption would be that such rents, so received, were a gift from her to him; and if so, his estate would not be accountable. This same rule would also apply to the receipt of interest on money belonging to her, and standing out upon loan." The portion of the charge we have quoted was approved by the court in bank, and the principles announced in the cases cited have not been disputed by any decision of this court before or since the act of April 11, 1848.

There is no foundation in reason for a different rule respecting rents of property settled to the separate use of the wife, and the rents of her separate property held under that act. The circumstances which create the presumption of a gift to the husband of the rents in the former case will accomplish the same result in the latter. But a broad and plain distinction is drawn by the cases between the receipt by the husband of the income of his wife's separate property and the receipt by him of the principal or *corpus* of her estate. A gift of the income may be implied from his receipt of it with her consent, but a gift of the principal will not be presumed from her mere acquiescence in his receipt and use of it. This distinction will be observed in the decisions which allow her to recover the *corpus*, but deny her compensation for the use of it, unless there is either an express or implied undertaking by the husband to pay interest or rent. The distinction rests, in part at least, upon the fact that income is usually applied to the maintenance of the family, while the effort in every well-regulated household is to preserve the principal intact. A wife may well consent that the income of her separate estate shall enter into a common fund for family uses, and object to an appropriation of the principal of it for that purpose. The living expenses of the family are materially affected by its income, without regard to the source of it; and if the wife permits the husband to receive and apply to these expenses the rents of her separate property, the fair inference is, that she intends a gift of them to him, and she will not be allowed to reclaim them from him or his estate. It would be manifestly unjust to require him to account for them, when he had received and expended them with her knowledge and approval for their joint benefit. It was said by Lord McNaughten, in *Edwards v. Cheyne*, L. R. 13 App. C. 385, after a careful

review of the English cases on this subject, that "the rule in equity is clear, from the earliest times, that where the husband and wife have lived together, the wife cannot charge her husband or her husband's estate as her debtor for arrears of her separate income which she has permitted him to receive. The object of the rule, according to Lord Hardwicke, was 'to prevent such accounts between husband and wife, which it is impossible to determine according to their rights after the death of the parties.' . . . Where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt by the husband, and bars all claim on the part of the wife or her representatives." In *In re Flamank*, L. R. 40 Ch. Div. 461, Kay, J., said: "It has always been held that while a husband and wife are living together in perfect comity, as these were, the receipt by the husband of the separate income of the wife may be treated as a gift of that separate income to him, to be applied for the joint benefit of himself and his wife, as for the maintenance of their household, and the like." An express consent or acquiescence of the wife need not be shown. It will be implied from circumstances and a course of life consistent with it, and opposed to any other conclusion.

In the case before us, the appellee received, during coverture, a conveyance of a hotel property in Marietta, but whether she had a separate estate from which she paid for it, or it was a gift to her from her husband, the record does not disclose, nor is it material. The husband paid the insurance and taxes and made repairs and improvements on the property, and he received and used the rents of it without objection from his wife. No account of rents and expenditures was kept by either. They dwelt together in harmony, and neither supposed that the relation of debtor and creditor existed between them respecting the income of the wife's separate estate. A short time before his death, the husband purchased, in the name and for the benefit of his wife, a house and lot, for which he paid the sum of \$1,825. This transaction, as explained by the husband, constituted a gift to the wife of the property so purchased, and evinced affectionate solicitude for her welfare and comfortable maintenance. It was not the act of a debtor towards his exacting creditor, and it was not consistent with that relation. It is apparent from the evidence produced by the appellee for the purpose of showing that this transaction was a gift to her from her husband that he did not regard

himself as her debtor for the rents of her separate property which he had received and used for their mutual benefit and support; nor do we find on this record any act or declaration of the wife manifesting disapproval of his appropriation of the rents, or indicating a purpose on her part to charge him with them. There is certainly no evidence that she entertained such a purpose while he was living. The first demand for an account came after his death, and it was then that she took the position that, as to the rents of her separate property received by him without objection from her, he was her debtor, and as to the property she received from him, she was his donee. The learned auditor sustained this position, and allowed her the rents, less the expenditures it was shown the husband had made for repairs and improvements, insurance and taxes. This allowance was placed distinctly upon the ground that there was no express or direct proof that she acquiesced in the husband's receipt of them. But as we have already seen, this is not necessary. It sufficiently appears that she knew that he rented the property, and must have known that he was paid for its use. The circumstances admit of no other conclusion. If she was not willing that he should receive the rents, she could easily have prevented it by a notice to the tenant. Her acquiescence is shown in her failure to do so, or to make any objection to the husband's action. It follows from the principles already considered that a gift of the rents to him was intended by her, and that she cannot now require his estate to account for them. If there are no other demands against the fund, it should be distributed to the widow and next of kin, under the intestate laws.

Decree reversed, and record remitted for further proceedings in accordance with this opinion, the costs of the appeal to be paid by the appellee.

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**HUSBAND AND WIFE—PRESUMPTION WHERE HUSBAND RECEIVES AND USES WIFE'S MONEY.** — Where a husband receives and uses the money of his wife, it is presumed that she intended to give it to him, and not to loan it: *Beecher v. Wilson*, 84 Va. 812; 10 Am. St. Rep. 833, and note. A mortgage given by a husband, to secure the repayment of a wife's earnings, alleged to have been borrowed by him from his wife, is invalid: *McAfee v. McAfee*, 28 S. C. 189.

**AGREEMENT BY WIFE TO SUPPORT FAMILY.** — Such an agreement may be rightfully performed by her, and she cannot undo what has been done by recalling what she has paid, nor require the husband to reimburse her for the outlay: *Third Nat. Bank v. Guenther*, 123 N. Y. 568, and note.

## RODGERS v. LEES.

[140 PENNSYLVANIA STATE, 475.]

**NEGLIGENCE — TRESPASSER.** — To enable a trespasser to recover for an injury, in addition to negligence, he must show that the injury was wantonly or intentionally inflicted on him by the defendant.

**NEGLIGENCE — CHILD AS TRESPASSER.** — A child of tender years may be a trespasser so as to bar recovery for his injury or death, even though he is so young that negligence cannot be imputed to him.

**NEGLIGENCE — CHILD AS TRESPASSER.** — Where a mill-owner maintains a cable for hoisting goods, at the end of which is a ball and hooks for attaching them, and a boy six or seven years of age, who has no right on the premises, disregarding a warning, gets upon the ball while the cable is in motion, with the intention and for the express purpose of riding up on the ball, and in consequence thereof is killed, he is a trespasser, and there can be no recovery against the mill-owner for the injury.

TRESPASS for negligence resulting in the death of plaintiff's son, about six or seven years of age. The defendants owned and operated a woolen-mill, and maintained an apparatus for hoisting and lowering to and from the upper floors of their building. This apparatus consisted of a covered projection from the top of the fifth floor, in which were placed a drum and a system of pulleys, from which a wire cable descended to the ground, being wound up and unwound by steam-power. To keep the cable taut while descending without a load, an iron ball eight or ten inches in diameter was fastened at the lower end. Below the ball, hooks were appended and used for attaching the cable to goods to be raised or lowered. The remaining facts are stated in the opinion.

*Charles Hunsicker*, for the appellants.

*N. H. Larzelere and M. M. Gibson*, for the appellee.

GREEN, J. If the chain and ball at the defendants' mill had been running regularly in the actual business of raising or lowering grain or flour, and the plaintiff's son had jumped upon the ball to ride up in the air, and fallen, it certainly could not be held that the defendants would be liable for the consequences. They would have been in the lawful prosecution of their business, with an apparatus proper for such uses, and owing no duty of protection to passing children against the consequences of their reckless acts in rushing into so manifest a danger. So if a boy of tender years attempts to climb upon a train of cars while in active movement, regardless of the dangerous results likely to ensue, and is injured, he certainly cannot recover damages from the company upon the

theory that he cannot be guilty of contributory negligence. If in the present case the chain and ball had not been in motion, but were at rest, and the boy had jumped upon the ball precisely as he did, and his act had set the chain to running, and started the ball upward, there would be plausibility in the argument for a recovery that the boy was ignorant of the effect of his act. The case then would perhaps have come within the decision of this court in the case of *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332. That decision was put expressly upon the ground that there was nothing to indicate the dangerous character of the platform, which was so placed that it was liable at any moment to fall, and crush children beneath it, like mice in a dead-fall. In the case of *Gillespie v. McGowan*, 100 Pa. St. 144, 45 Am. Rep. 365, we said that that case "was decided upon its own peculiar circumstances," and we also said "it was not intended to assert the doctrine that a child cannot be treated as a trespasser or wrong-doer; and so far as it appears to sanction such a doctrine it must be considered as overruled." We also said, "*Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, is authority only for its own facts." We further said: "It is settled by abundant authority that, to enable a trespasser to recover for an injury, he must do more than show negligence. It must appear there was a wanton or intentional injury inflicted on him by the owner."

That a child of tender years may be a trespasser, and be subject to the consequences of his trespass, has been decided by this court so many times, and in so many varying circumstances, that the question is no longer open to discussion: *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375; 84 Am. Dec. 457; *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210; 8 Am. Rep. 251; *Duff v. Allegheny V. R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675; *Cauley v. Pittsburgh etc. R'y Co.*, 95 Pa. St. 398; 40 Am. Rep. 664; 98 Pa. St. 498; *Hestonville P. R'y Co. v. Connell*, 88 Pa. St. 520; 32 Am. Rep. 472; *Moore v. Pennsylvania R. R. Co.*, 99 Pa. St. 301; 44 Am. Rep. 106; *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258; 47 Am. Rep. 706; *Gillespie v. McGowan*, 100 Pa. St. 144; 45 Am. Rep. 365; *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. St. 321; *McMullen v. Pennsylvania R. R. Co.*, 132 Pa. St. 107; 19 Am. St. Rep. 591.

In *Cauley v. Pittsburgh etc. R'y Co.*, 98 Pa. St. 498, we held that where a boy seven years old, who was playing upon a sand-car, was ordered off the car by the conductor while the car was moving slowly, and in getting off was injured, there

could be no recovery. When the case was first heard in this court (reported in 95 Pa. St. 398; 40 Am. Rep. 664), we said: "In regard to the suit brought for the child by his father as his next friend, it is sufficient to say that, the child being unlawfully upon the car, the defendant company owed it no duty, and is not liable for the injury." In *Hestonville P. R'y Co. v. Connell*, 88 Pa. St. 520, 32 Am. Rep. 472, where a child six years and nine months old was injured in attempting to get on the front platform of a car while in motion, we held there could be no recovery. Mr. Justice Gordon, in delivering the opinion, said: "Nevertheless, it may be assumed that a child old enough to be intrusted to run at large has wit enough to avoid ordinary danger, and so persons who have business on the streets may reasonably conclude that such a one will not voluntarily thrust itself under the feet of his horses, or under the wheels of his carriage; *a fortiori* may they conclude that they are not to provide against possible damages that may result to the infant from its own willful trespass." In the case of *Moore v. Pennsylvania R. R. Co.*, 99 Pa. St. 301, 44 Am. Rep. 106, a boy of ten years was walking along the track on the sleepers, and was run over by a passing train and killed. We held there could be no recovery, because he was a trespasser. We said: "The circumstance that the trespasser in this instance was a boy ten years of age cannot affect the application of the rule. The defendants owed him no greater duty than if he had been an adult. They are not subject to an obligation to take precautions against any class of persons who may walk on and along their tracks." In *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. St. 321, a boy of seven years, while crossing upon defendant's bridge, got upon a gas-pipe five inches in diameter, at a place where there was an opening in the floor, and while walking on the pipe fell into the river below and was drowned. We held there could be no recovery. Mr. Justice Paxson, delivering the opinion, said: "The child who was killed was not using it (the bridge) in the ordinary way. He was walking upon the gas-pipe, where he ought not to have been, and which was so dangerous that his younger brother remonstrated with him, and warned him to get off. It is not necessary to impute negligence to the child; it is sufficient that he was injured, not as the result of the use of the bridge, but as the consequence of his venturing in his childish recklessness where no one, child or adult had any business to be."

These principles are precisely applicable to the present case. The chain and ball were not at rest; they were in actual motion; and the boy, fully knowing that, and intending to do exactly what he did do, jumped upon the ball for the very purpose of riding upward on it. The boy who was with him, and who testified for the plaintiff, said: "The ball was down. When both of us met, he said: 'Hello, Kinney; I bet I can go up higher on the ball than you.' I told him he had better not, — he would fall. I did not hear him say anything then. He got on the ball, and sat on the ball, and held the chain. Then, when he was going up, he tried to get down. He got down from the ball, and the hook caught him, — I think that the hook caught him, — and then, when he was going up higher, the hook gave way when he was going up. Then he hung with his hands on the ball. Then Tom McCormick came out of the door of the mill, and when he saw the boy going up, he ran to leave the ball down. Then the boy fell before he had time."

It is thus fully proved by the plaintiff, and not contradicted, that the boy got upon the ball for the express purpose of riding up on it, and notwithstanding his companion warned him not to do it, saying he might fall. His death was caused solely by his own rash and reckless act, while in a place where he had not the least right to be. Of course he was a trespasser in every sense of the word. The ball and chain were not used for any purpose of conveying persons up or down, and the case is therefore stronger than either *Cauley v. Pittsburgh etc. R'y Co.*, 98 Pa. St. 498, or *Hestonville R'y Co. v. Connell*, 88 Pa. St. 520; 32 Am. Rep. 472. We can see no reason why the principle of those cases is not strictly applicable to this, only in a greater degree. And the doctrine of *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706, *Philadelphia etc. R. R. Co. v. Hummell*, 44 Pa. St. 375, 84 Am. Dec. 457, and *Oil City etc. Bridge Co. v. Jackson*, 114 Pa. St. 321, that the boy was in a place where he had no right to be, and where he was not entitled to any protection from the defendants against his own reckless trespass, is, if anything, still more applicable. In the Oil City bridge case, the boy had a right to be on the bridge for the purpose of crossing it, and in the Schwindling case the boy was not necessarily a trespasser by being on the platform; but here the trespass was absolute and very gross. There was no right or justification, or excuse of any kind, for the presence of the

boy, or of any other person, on the ball, for any purpose whatever, much less for the purpose of riding on it. In point of fact, the ball and chain had been in use for hoisting up material until almost the moment of the accident. One of the men was still in the mill. A number of the defendants' hands testified that the ball was stopped, and hung up out of reach, but in some way they could not account for, it had got in motion again, showing that the ball was not carelessly left dangling and in a condition to move. In this momentary interval, it happened that the plaintiff's son came along and jumped upon it. Upon the whole case, we think the defendants' first and second points should have been affirmed.

Judgment reversed.

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**NEGLIGENCE — TRESPASSERS.** — People who stray about the premises of others must look out for dangerous or unsafe places, or themselves suffer the consequences: *Bedell v. Berkey*, 76 Mich. 435; 15 Am. St. Rep. 370, and note.

**NEGLIGENCE — LIABILITY FOR, TO AN INFANT TRESPASSER.** — If an infant had sufficient capacity to know the distinction between good and evil, he would be responsible for his conduct; and if he did not, there might be a recovery: *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 362, and note. For a full discussion of liability to infant trespassers for negligence, see extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590-596.

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## KELLY v. SUN FIRE OFFICE.

[141 PENNSYLVANIA STATE, 10.]

**INSURANCE — WAIVER BY ASSURED — OPTION TO PAY LOSS OR REBUILD.** —

Where, under a policy of fire insurance, the insurer has the option to rebuild or pay the loss within thirty days after completion of proofs thereof, and after receiving such proofs asks for and obtains additional and corrected proofs, without objection on the part of the insured, the latter thereby waives the right to maintain that his original proofs were complete.

**NOTICE OF AN ELECTION TO REBUILD**, given to the insured within proper time after the corrected proofs were received, is a defense to an action to recover the amount of loss, on the ground that the original proofs were complete, and that the option had expired before notice to rebuild was given.

**INSURANCE — NECESSITY FOR MAGISTRATE'S CERTIFICATE OF LOSS.** — A condition in a policy of fire insurance requiring the assured to procure of the nearest magistrate, notary public, or other officer a certificate that the loss was sustained without fraud is binding upon the insured, unless waived by the insurer.



*E. N. Willard, Everett Warren, and C. E. Mumford, for the appellant.*

*George S. Purdy, for the appellee.*

PAXSON, C. J. The policy of insurance on which this suit was brought in the court below gave the defendant company the option to rebuild, or pay the amount of loss sustained, in case the property insured was destroyed by fire. The learned judge below conceded its right of option, but left it to the jury to find whether the company had lost its right by its delay in exercising it. The jury found the delay, and if there was evidence upon this point sufficient to submit, the verdict must stand.

I do not understand the facts to be disputed. Those that are important are substantially as follows: The proofs of loss were forwarded to the adjuster about December 2d, and were received by him two days thereafter. On December 5th they were returned to the plaintiff, who sent them to the company, with the corrections asked for, on the 30th of January. I find no contradiction of this testimony, and one of the papers which made up the corrections bears that date. They were received by Mr. Fellows, the adjuster, on February 1st. On February 28, 1890, the company served notice on the plaintiff of its intention to rebuild, and called upon him, under the terms of the policy, to furnish plans and specifications for that purpose. The plans and specifications were furnished, but the plaintiff alleged that the option of the company had not been exercised in time, and brought this suit, not upon a contract to rebuild, but for the loss under the policy.

I do not understand the ruling of the court below, or the argument of plaintiff's counsel, to be based upon a denial of any of the foregoing facts. On the contrary, it is assumed that the original proofs of loss were complete, and a full compliance with the conditions of the policy; that the additional proofs required by the company were unreasonable; and that the time limited for the option of the company commenced to run not later than December 5th. If they are right in this, the company has no defense.

There would have been more force in this position had the plaintiff elected to stand upon his original proofs. He did not do so, but proceeded to furnish the additional matters required. Granted that as to any of these matters he had a right to decline further information, he waived such right by

furnishing it. We have repeatedly held that insurance companies may waive the benefit of provisions in their policies by this course of dealing, and it is only fair that we should hold the assured to the same rule. The company, by the terms of its policy, had thirty days within which to exercise its option, after the completion of the proofs of loss. The proofs cannot be said to have been completed until the 30th of January. This conclusively appears from the act of the plaintiff himself. Had he notified the company in December that he regarded his proofs as complete and would furnish no other, the company would not have been misled, but would have been put to its option, assuming that the proofs were sufficient.

We have not entered into the details of the proofs of loss, for the reason that we do not consider it necessary, under our view of the case. There is one matter, however, to which we will refer. It is not absolutely necessary to our decision, yet it is fairly raised and assigned as error. We do so, that the profession may not be misled.

The third assignment alleges that the court erred in the following portion of its charge: "So far as the certificate of the magistrate is concerned, we are inclined, gentlemen, to relieve you of all consideration of that question. We think, in the case that has been presented to us here, in 109 Pennsylvania State, the supreme court have intended to say—we understand them to say—that no insurance company has the right to require the production of such a certificate from a magistrate or a notary public. We hope they have meant to say this; for, although this in former years was held to be a condition precedent to recovery, it required sometimes of an insured that which was impossible for him to render, and no insurance company has any power over a magistrate or notary public to require him to render such certificate. We think, so far as that certificate is concerned, that the proofs of loss were sufficient."

The case above referred to by the learned judge was *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535. The precise language in the opinion of the court in that case is as follows: "The company had no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default." If the learned judge below was misled by the foregoing, he has the consolation of knowing that the writer was equally misled in the recent case of *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73, 21 Am. St. Rep. 904, where he

adopted the language referred to, without much reflection, and in the stress of business. Fortunately, whether right or wrong, it has done no injury, as each of those cases was decided upon other sufficient grounds, and the remark may be regarded as *dictum*. The present seems a fitting time to examine the question, and see if the *dictum* is law. If not, it is our plain duty, as it is our pleasure, to say so promptly.

We do not think it was error to say that an insurance company "had no right to require a public officer to act in the adjustment of its risks." No such officer could be compelled to do so. This is plain enough. It does not follow that the parties to a policy of insurance may not contract that the insured shall procure a certificate from the nearest magistrate, notary, or other officer. Such contract is not forbidden by any law or rule of public policy. It may be a foolish contract on the part of the assured, but we do not reform men's contracts because of their folly. In the case in hand, the plaintiff did not complain of this clause; on the contrary, he complied with it. While the right of a company to compel a public officer to adjust its loss cannot be successfully claimed, yet, where such a clause exists in a policy by the agreement of the parties, we are not prepared to adopt the expression in *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535, that "the neglect of the assured to even ask a certificate from that officer would have been no default." We are not dealing with the case of an attempt on the part of the assured to obtain such a certificate, and the refusal of the officer to give it.

This is not a new question; and we are therefore spared an extended discussion of it. It is sufficient to refer to the authorities. In 2 Phillips on Insurance, 472, the rule is thus stated: "Fire policies generally have a provision that the assured shall produce certain certificates respecting the loss, which vary considerably, as will appear from the instances to be given. It is, like all express conditions, always to be complied with, unless the right to demand the certificate is expressly or impliedly waived by the insurers." This, I believe, is the rule in all the best books on insurance; it is certainly so in *Flanders on Insurance*, 2d ed., 586, and in *Wood on Insurance*, 710. It was also declared in the court of king's bench, by Lord Kenyon, C. J., nearly a century ago, in *Worsley v. Wood*, 6 Term Rep. 710, and has continued to be the law of England to this day. In *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25, Chief Justice Marshall sustained a

the assured, such certificate is a sufficient compliance with the terms of the condition: *Etna F. Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90; *Lockwood v. Middlesex etc. Ins. Co.*, 47 Conn. 553.

Where the issue is raised that it is a badge of fraud that the insured did not furnish from the nearest magistrate a certificate of his loss, but furnished the certificates of other magistrates near by, the certificate of the nearest magistrate, reciting that he had examined into the loss, and believed it *bona fide* a total loss of goods, but had not had time to examine as to the exact amount of the loss, is admissible, though not a compliance with the policy, in failing to state the amount of the loss: *Petersburgh Ins. Co. v. Manhattan Ins. Co.*, 56 Ga. 446.

Where the policy requires that the insured must furnish with his proofs of loss a certificate of the value of such loss, but does not make the certificate an award, or stipulate that the insured shall be bound by his estimate, a statement by the insured in his proof of loss, fixing the amount at a certain sum, while the certificate of the magistrate, which formed part of such proof, states the loss to be a less sum, will not limit a recovery to the amount stated in the certificate, but the insured may establish the true amount of his loss by witnesses: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598.

As to what is a compliance with the condition that the nearest magistrate or notary must certify to the loss, the rule was laid down at an early date that in determining the contiguity of the magistrate or notary to the place of the fire, the place of his business, and not his residence, will be regarded, and a nice calculation of distances will not be gone into to ascertain the nearest officer who might have given the certificate. The proximity of such officer to the place of the fire is all that can be required: *Turley v. North Am. F. Ins. Co.*, 25 Wend. 374. This rule has been uniformly followed, and the reason therefor is given in *Williams v. Niagara F. Ins. Co.*, 50 Iowa, 561-565, to be, that "the provision in the policy that the certificate therein required must be given by the nearest magistrate or notary public was, without serious doubt, inserted for the purpose of preventing the insured from selecting the officer to perform such duty. While this is so, the provision must have a reasonable, instead of a literal, construction. It does not, we think, require that the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken. Nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer, nice distinctions as to the distance should not be indulged." So in *German American Ins. Co. v. Etherton*, 25 Neb. 505-510, it was said that "upon that subject we need only say that, in our opinion, it was not necessary that a careful and correct measurement of distances should be made for the purpose of ascertaining the nearest officer qualified to make the certificate." Again, in *American Central Ins. Co. v. Rothchild*, 82 Ill. 167, the court said: "We will enter into no calculation to ascertain whether the office or residence of the officer who made the certificate of loss as required by the fifth condition of the policy was a few feet nearer or more distant from the exact point where the fire occurred, than that of another notary or justice. It is sufficient if it appears the certificate was made by an officer of the character designated residing in the same locality. That is all this condition in the policy requires, when given a common-sense construction. Where there are several officers residing in the same immediate neighborhood, all of whom are competent to make the certificate of loss, that of either of them will be

a sufficient compliance with the condition of the policy, and a distance of a few yards therefrom from the scene of the fire will not be regarded as a matter of any importance whatever." Several decisions, however, seem to conflict somewhat with this rule, although in them no fine distinctions as to distance were sought to be drawn.

They maintain that, under such requirement, the certificate of the nearest officer of the classes named, whether magistrate or notary, is necessary, and that the certificate of the nearest magistrate, if a notary is nearer, is insufficient, and not a compliance with the condition. *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167; *Gilgus v. Commercial F. Ins. Co.*, 20 Hun, 93; 87 N. Y. 628. Where the certificate of the magistrate who lived nearest the place of the fire, and who stated therein that he was not competent to appraise a portion of the property destroyed, was offered in evidence, and on objection another was offered, given by a magistrate whose residence was more distant, but whose office or place of business was nearer, than that of the other magistrate, and containing a compliance with all the stipulations of the policy, it was decided that the second certificate offered was admissible, and a compliance with the policy, and that in construing such condition fine distinctions would not be drawn as to distance, in order to enable the insurer to escape obligation on his valid contract through mere technicalities. *Agricultural Ins. Co. v. Ben Miller*, 70 Md. 400. Or where it appears that the nearest notary refused to act, on the ground that he was employed by the insurance company in ascertaining the facts and taking affidavits concerning the fire, the insured is relieved of the necessity of obtaining his certificate, and need not inform the insurer of the reason for obtaining the certificate of another notary. *Noone v. Transatlantic F. Ins. Co.*, 88 Cal. 152.

In this connection it may be stated that a notary public is not a magistrate within the meaning of a policy requiring a certificate of loss by a "magistrate nearest the place of fire": *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510; and that, under a statute in Maine, a condition in the policy requiring such certificate is void: *Bailey v. Hope Ins. Co.*, 56 Me. 474.

A condition in a policy that the nearest magistrate, notary, or other officer, not interested in the loss, nor related to the assured, must certify to the loss is only intended to secure an impartial arbitrator between the parties, — one who will neither gain nor lose, directly or indirectly, by the determination of their rights and obligations in respect to the loss. Consequently, in an action on such a policy, where it appeared that the nearest magistrate owned and occupied, as a residence and store, a building adjoining the premises burned, that he had no insurance on his property which was injured as a direct result of the fire, and that he had made complaint before a magistrate charging the insured with having set the fire, it was held that as his certificate as required by the policy would be almost conclusive against his right to recover his loss as against the insured, he was interested in the loss within the meaning of the policy, and that the certificate of the next nearest qualified officer was a sufficient compliance with the condition in the policy. *Wright v. Hartford F. Ins. Co.*, 36 Wis. 522. So where the nearest qualified officer is a mortgage creditor of the insured, and refuses to make the certificate, the certificate of the next nearest is a sufficient compliance with such condition: *Smith v. Home Ins. Co.*, 47 Hun, 30. Such a condition in a policy means that the certifying magistrate must not be concerned in the loss by reason of having an interest in the property insured, or in the policy as security for a debt to him, and does not disqualify a magistrate from acting who is a general creditor of the assured. *Dolliver v. St. Joseph*

*etc. Ins Co.*, 131 Mass. 39. The certificate of the magistrate need not state upon its face that he is not related to the insured, nor interested in the loss, although such must be the fact: *Bruts v. Springfield etc. Ins. Co.*, 24 Ma. App. 145; and the statement therein that he is not related is sufficient until the insurer establishes to the contrary: *Cornell v. Le Roy*, 9 Wend. 163.

**WAIVER.**—When the policy requires the production of the certificate of an officer before the loss is payable, and no word or act has been done by the insurer to mislead the insured or throw him off his guard, mere silence does not create the inference of a waiver of this condition: *Mueller v. South Side Ins. Co.*, 87 Pa. St. 399. Nor does such waiver result from the fact that the assurer, after receiving a certificate which is not in compliance with the condition, enters upon an investigation as to the extent of the loss, without immediately objecting to the certificate, and offers to pay a certain amount: *Noonan v. Hurlford F. Ins. Co.*, 21 Mo. 81. The production of the certificate is not waived by the insurer's agent receiving proofs of loss without objection to the omission of the certificate, in the absence of proof of authority in the agent to make such waiver. In one case it was held that the production of the certificate was not waived by the insurer objecting to pay the loss on other grounds, nor by the fact that proofs of loss have been in his hands for two years, without calling the attention of the assured to the absence and want of the certificate: *Daniels v. Equitable Ins. Co.*, 50 Conn. 551. Again, the mere delay of the insurer of thirty-seven days before requiring the certificate is not a waiver thereof, when the policy is not payable until sixty days after proofs of loss are received, and the assured does not claim that the delay prevented him from obtaining the certificate so as to begin suit at the expiration of that time, or that any other injury was caused by the delay: *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167. On the other hand, the retention by the assurer, until the time of suit, without objection, of proofs of loss, otherwise proper, and accompanied by the certificate of a notary, instead of a magistrate, as required by the policy, will constitute a waiver of such defect: *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510.

The more rational decisions, however, show that the insurer must act in good faith; and cannot, after his seeming acquiescence in the proofs furnished, object that no certificate has been produced, or if produced, is defective in substance or in not being made by the proper magistrate or other officer. Thus if the insurer does not object within a reasonable time, as within two months, to the absence of the required certificate from the proofs of loss, he will be deemed to have waived all defects in such proofs: *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506. So a delay of five months in objecting to the certificate furnished is a waiver of objection to its sufficiency: *Lockwood v. Middlesex Mutual Ins. Co.*, 47 Conn. 553. The insurer's neglect to object within a reasonable time to the proofs of loss, including the magistrate's certificate, when the defects therein could have been remedied if intelligently pointed out, amounts to a waiver of their insufficiency: *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423. So if the certificate is defective, the assurer will not be allowed to insist upon its insufficiency if he has refused to return it to the insured for the purpose of correction, and has failed to point out what he deems to be defects therein: *Turley v. North Am. Ins. Co.*, 25 Wend. 373; and when the only objection made to the proofs of loss is, that they do not contain the required certificate, and the insured has the right to furnish the certificate at a later date, the objection that proofs were not furnished in time is waived: *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389. All necessity on the part of the assured to furnish the certificate of loss

is waived by the company when it, immediately after the loss, renounces all liability therefor: *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562-569.

Where, instead of the certificate of the nearest magistrate as required by the policy, the certificate of a reputable citizen, not a magistrate, is received and assented to by the agent of the insurer as sufficient, the assurer waives all defects in the certificate, especially when he puts his refusal to pay the loss upon other grounds: *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50. So where a certificate of loss is furnished, to which no objection is made within a reasonable time, the assurer will be estopped from making objection to its sufficiency on the ground that it was not made by the nearest magistrate: *Nease v. Aetna Ins. Co.*, 32 W. Va. 283. A letter from the assurer to the assured, objecting to the magistrate who signed the certificate, but not objecting to its form, is a waiver of any defect in the form: *Bailey v. Hope Ins. Co.*, 56 Me. 474. Where the policy provides that the certificate of loss of the nearest notary must be furnished if required, and such certificate has not been requested by the insurer at the time when proofs of loss were sent, he waives the right to claim, at the time of the trial, that the proofs of loss are insufficient because such certificate has not been furnished: *Jones v. Howard Ins. Co.*, 117 N. Y. 103. The provision in the policy concerning the production of the certificate is waived if the insurer, without objection, joins in submitting the loss to arbitration, and this, notwithstanding a provision in the policy that none of its conditions can be waived without the written consent of the insurer indorsed thereon: *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297.

## DOUD v. CITIZENS' INSURANCE COMPANY.

[141 PENNSYLVANIA STATE, 47.]

**INSURANCE — OCCUPANCY OF PREMISES.** — Where a building occupied by a tenant is insured under a policy prohibiting the vacating of the premises, and the tenant removes two days before the building is burned, while the insured takes possession and occupancy one day prior thereto, and leaves a person in charge during such time as is absolutely necessary to obtain and remove the goods of the insured from her home, seven miles away, which would have been completed on the day subsequent to the fire, such occupancy by the insured is part of a continuing occupancy, and her absence from the building only temporary and unavoidable, not amounting to an abandonment of occupancy, within the meaning of the policy.

**INSURANCE — OCCUPANCY OF PREMISES.** — Under a policy of insurance on leased premises, which contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy, without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises.

*P. P. Smith, and Connolly and Davis*, for the appellant.

*A. J. Colborn, Jr., and Samuel B. Price*, for the appellee.

GREEN, J. On the trial of this case, the plaintiff testified that she went to the house in question on Wednesday, the

*etc. Ins Co.*, 131 Mass. 39. The certificate of the magistrate need not state upon its face that he is not related to the insured, nor interested in the loss, although such must be the fact: *Erwin v. Springfield etc. Ins. Co.*, 24 Mo. App. 145; and the statement therein that he is not related is sufficient until the insurer establishes to the contrary: *Cornell v. Le Roy*, 9 Wend. 163.

**WAIVER.** — When the policy requires the production of the certificate of an officer before the loss is payable, and no word or act has been done by the insurer to mislead the insured or throw him off his guard, mere silence does not create the inference of a waiver of this condition: *Mueller v. South Side Ins. Co.*, 87 Pa. St. 390. Nor does such waiver result from the fact that the assurer, after receiving a certificate which is not in compliance with the condition, enters upon an investigation as to the extent of the loss, without immediately objecting to the certificate, and offers to pay a certain amount: *Noonan v. Hartford F. Ins. Co.*, 21 Mo. 81. The production of the certificate is not waived by the insurer's agent receiving proofs of loss without objection to the omission of the certificate, in the absence of proof of authority in the agent to make such waiver. In one case it was held that the production of the certificate was not waived by the insurer objecting to pay the loss on other grounds, nor by the fact that proofs of loss have been in his hands for two years, without calling the attention of the assured to the absence and want of the certificate: *Daniels v. Equitable Ins. Co.*, 60 Conn. 551. Again, the mere delay of the insurer of thirty-seven days before requiring the certificate is not a waiver thereof, when the policy is not payable until sixty days after proofs of loss are received, and the assured does not claim that the delay prevented him from obtaining the certificate so as to begin suit at the expiration of that time, or that any other injury was caused by the delay: *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167. On the other hand, the retention by the assurer, until the time of suit, without objection, of proofs of loss, otherwise proper, and accompanied by the certificate of a notary, instead of a magistrate, as required by the policy, will constitute a waiver of such defect: *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510.

The more rational decisions, however, show that the insurer must act in good faith; and cannot, after his seeming acquiescence in the proofs furnished, object that no certificate has been produced, or if produced, is defective in substance or in not being made by the proper magistrate or other officer. Thus if the insurer does not object within a reasonable time, as within two months, to the absence of the required certificate from the proofs of loss, he will be deemed to have waived all defects in such proofs: *Killipe v. Putnam F. Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506. So a delay of five months in objecting to the certificate furnished is a waiver of objection to its sufficiency: *Lockwood v. Middlesex Mutual Ins. Co.*, 47 Conn. 553. The insurer's neglect to object within a reasonable time to the proofs of loss, including the magistrate's certificate, when the defects therein could have been remedied if intelligently pointed out, amounts to a waiver of their insufficiency: *Mercantile Ins. Co. v. Holtzma*, 43 Mich. 423. So if the certificate is defective, the assurer will not be allowed to insist upon its insufficiency if he has refused to return it to the insured for the purpose of correction, and has failed to point out what he deems to be defects therein: *Turley v. North Am. Ins. Co.*, 25 Wend. 373; and when the only objection made to the proofs of loss is, that they do not contain the required certificate, and the insured has the right to furnish the certificate at a later date, the objection that proofs were not furnished in time is waived: *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389. All necessity on the part of the assured to furnish the certificate of loss



is waived by the company when it, immediately after the loss, renounces all liability therefor: *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562-569.

Where, instead of the certificate of the nearest magistrate as required by the policy, the certificate of a reputable citizen, not a magistrate, is received and assented to by the agent of the insurer as sufficient, the assurer waives all defects in the certificate, especially when he puts his refusal to pay the loss upon other grounds: *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50. So where a certificate of loss is furnished, to which no objection is made within a reasonable time, the assurer will be estopped from making objection to its sufficiency on the ground that it was not made by the nearest magistrate: *Nease v. Aetna Ins. Co.*, 32 W. Va. 283. A letter from the assurer to the assured, objecting to the magistrate who signed the certificate, but not objecting to its form, is a waiver of any defect in the form: *Bailey v. Hope Ins. Co.*, 56 Mo. 474. Where the policy provides that the certificate of loss of the nearest notary must be furnished if required, and such certificate has not been requested by the insurer at the time when proofs of loss were sent, he waives the right to claim, at the time of the trial, that the proofs of loss are insufficient because such certificate has not been furnished: *Jones v. Howard Ins. Co.*, 117 N. Y. 103. The provision in the policy concerning the production of the certificate is waived if the insurer, without objection, joins in submitting the loss to arbitration, and this, notwithstanding a provision in the policy that none of its conditions can be waived without the written consent of the insurer indorsed thereon: *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297.

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## DOUD v. CITIZENS' INSURANCE COMPANY.

[141 PENNSYLVANIA STATE, 47.]

**INSURANCE—OCCUPANCY OF PREMISES.**—Where a building occupied by a tenant is insured under a policy prohibiting the vacating of the premises, and the tenant removes two days before the building is burned, while the insured takes possession and occupancy one day prior thereto, and leaves a person in charge during such time as is absolutely necessary to obtain and remove the goods of the insured from her home, seven miles away, which would have been completed on the day subsequent to the fire, such occupancy by the insured is part of a continuing occupancy, and her absence from the building only temporary and unavoidable, not amounting to an abandonment of occupancy, within the meaning of the policy.

**INSURANCE—OCCUPANCY OF PREMISES.**—Under a policy of insurance on leased premises, which contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy, without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises.

*P. P. Smith, and Connolly and Davis*, for the appellant.

*A. J. Colborn, Jr., and Samuel B. Price*, for the appellee.

GREEN, J. On the trial of this case, the plaintiff testified that she went to the house in question on Wednesday, the

day before the fire; that she had received no notice from her tenant, Mrs. Berheight, that she intended to leave the house, and that she, the plaintiff, had no knowledge until that day that the tenant had left. She was corroborated in this statement as to her going to the house on that Wednesday by the witness Mrs. Brown; and there was no testimony in the case contradicting either the plaintiff or Mrs. Brown on this subject. Both of these witnesses also testified that there were several articles of furniture belonging to the plaintiff in the house at that time, and that the plaintiff was engaged and remained in the house all day, until six o'clock in the evening. Although Mrs. Berheight at first said that it was about a week after she moved before Mrs. Doud came over to the house, she was unable to fix the time definitely; either when she finished moving, or on what day it was she saw Mrs. Doud at the house. She said she would not be precise as to a day or two; she was sure she moved early in the week, and thought it was Friday when Mrs. Doud came over; but she was clearly wrong in this, as the fire occurred during the night of Thursday. She said it was either Monday or Tuesday that she moved, and that it took her one or two days to finish moving. But Mrs. Brown testified that Mrs. Berheight moved the last of her things out two days before the fire, and that Mrs. Doud came to the house on the day before the fire; so that, if her testimony was correct, Mrs. Doud came to the house the next day after Mrs. Berheight left, and remained all day.

This being the state of the admitted testimony, Mrs. Doud offered to prove that she went to the village where the house was, desiring to get possession of part of the building for herself and an invalid son; that upon learning that Mrs. Berheight was moving out, she went to her home in Dunmore, and immediately packed such household and personal articles as she needed, with the intention of moving into the house on Friday morning; and that she had her things packed on Thursday, ready to move on Friday, but was prevented from doing so by the fire. This offer of proof was rejected. Another offer was then made, covering substantially the same facts, and also that she had been advised by her physician to take her invalid son to the village of Drinker, where the house was; and further, that she had placed a man in charge of the house on Wednesday, to remain until Friday. This offer also was rejected. She also made a similar offer of proof by her daughter, that she was engaged all day Thurs-

day in picking up and packing household articles preparatory to the moving on Friday. This offer also was rejected. The question that arises is, whether, under all the facts proved and offered to be proved, there was such a vacation of the premises as avoided the policy, under the sixth clause thereof. The language of the clause is as follows: "6. This policy will not cover unoccupied buildings, unless insured as such; and if the premises insured shall be vacated, without the consent of the company indorsed hereon, . . . the policy shall cease and determine."

It is argued for the appellee that the case of *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277, 35 Am. Rep. 656, decides the question adversely to the appellant. Upon examining that case, however, it will be found that there is a marked difference in its facts from those of the present case. There an absolute vacation of the premises had taken place, in the very manner prohibited by the contract, by the "removal of the occupant," and there was no substitution of another occupant, either as tenant or owner, actually proceeding when the fire occurred. The very contingency which in express terms avoided the policy had occurred. The vacation of the premises was complete, and had been for several days; the owner did not occupy, or propose or intend to occupy, the house himself, and no new tenant had been obtained or was even being negotiated with. There was nothing but an intention and an effort of the owner to engage a new tenant. Nothing had been accomplished, however, in that direction, when the fire took place. We held that it was the duty of the insured, in those circumstances, to obtain the consent of the company to the vacancy; and as no effort of that kind was made, the literal terms of the policy prevailed, and it was avoided.

But in the present case the facts were entirely different. The owner had several articles of furniture in the building, and a few of those of the departed tenant had not yet been removed. The owner immediately took possession of the house on the day before the fire, remaining until evening, having first sent for and obtained the key from the departing tenant. She also immediately announced her purpose of occupying the house as soon as she could get her household goods removed, and at once commenced, and continued through the whole of Thursday, the preparation of her goods for removal on the next day, — Friday. Moreover, she offered to prove, but was not permitted to do so, that she placed a

man in charge of the house on Wednesday, to remain until Friday. In such circumstances as these, we do not consider that there was any vacation of the premises, or any more of a cessation of occupancy than would necessarily arise upon a change of tenants. A reasonable time must necessarily be allowed to carry out such a change without imposing upon the insured the penalty of either an intended or a permitted vacation of the premises. There was no intended vacation here, in any view of the facts, and there was no real cessation of occupancy. The occupancy of the owner on Wednesday was part of a continuing occupancy, to be proceeded with on Friday, and only delayed by the absolute necessity of obtaining and removing the owner's goods from her home, seven miles distant. Her absence from the building was only for a temporary purpose, which was unavoidable, but which was in no sense an abandonment of occupancy.

In this respect the case is entirely analogous with the case of *Franklin F. Ins. Co. v. Kepler*, 95 Pa. St. 492, where we held that the absence of the insured from his dwelling from Wednesday until Monday, to attend a funeral, was not a breach of the condition of his policy, almost identical with that of the present policy. The same principle was enforced in *Lebanon Ins. Co. v. Leathers*, 20 Week. Not. Cas. 107, where there was a cessation of the operations of a tannery for three months, and a condition of avoidance if the property should cease to be operated as a tannery. We held that "a mere temporary suspension of the business of the establishment for the purpose of making repairs, or from want of a supply of materials, is clearly not ceasing to operate the establishment, within the meaning of the policy." In the case of *Ins. Co. of N. A. v. Hannum*, reported in 1 Mona. 369, but not reported elsewhere, with the same condition as to vacancy as in this case, the tenant moved out on April 1st, at the expiration of his term, and the premises were rented to another tenant for a term commencing at that date, but the new tenant did not move in at once, but made his arrangements to move in on April 5th. The house was burned on April 3d. The court below ruled that "the period of time during which the house was not occupied, or rather the condition in which it was during those two days, was not such a cessation of the occupancy contemplated by the policy, for such a length of time, as would vitiate the policy." This court affirmed the judgment for the plaintiff without hearing the defendant in error.

We are clearly of opinion that there was no breach of the condition of this policy prohibiting the vacation of the premises. We sustain the first, second, fifth, and sixth assignments of error. As we hold that there was no breach of condition arising upon the facts of the case, it is not necessary to consider the question whether there was a waiver of the condition in question. The rejected offers of testimony should all have been received except the one covered by the fourth assignment, which was a mere general offer, without any specific facts stated.

Judgment reversed, and *venire de novo* awarded.

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**INSURANCE—OCCUPANCY OF PREMISES.**—A tenant moved out on Tuesday. On Wednesday the owner took possession, and commenced cleaning the house, intending to occupy it, with his family, on Saturday. On Friday night, the house burned down. It was held that the house was not vacant: *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; 59 Am. Rep. 444. An almost identical case was *Shackleton v. Sun F. Office*, 55 Mich. 288; 54 Am. Rep. 379. For a full discussion of the terms "vacant" and "unoccupied," and similar expressions, in policies of insurance, see extended note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390; *Richards v. Continental Ins. Co.*, 83 Mich. 508.

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## ESTATE OF VANCE.

[141 PENNSYLVANIA STATE, 291.]

**WILLS—EFFECT OF WIDOW'S ELECTION ON LEGACIES.**—Where the testator's will bequeaths the income of his estate to his widow for life, with particular and residuary legacies payable at her death, her election to take under the intestate laws, and against the will, is equivalent to her death, and its effect is to make all the legacies payable at once, in the order of their priority. In such case, particular legacies will not be postponed until the widow's death, in order that the income thereof may be paid the residuary legatees during her life, to swell the amount to which they are entitled, and compensate for diminution in their legacies.

**WILLS—RIGHTS OF DEFINITE AND RESIDUARY LEGATEES.**—Equity will interpose, if necessary, to preserve the intention of a testator from destruction; but it will never interfere in favor of a residuary legatee, as against a definite legatee, unless upon a plain implication in the will that the residuary legatee was in fact a preferred object of the testator's bounty.

**JAMES M. VANCE**, at the time of his death, left an estate exceeding four hundred thousand dollars in value. By his will he bequeathed the income of his real estate to his wife for life, charged his personal estate with annuities amounting to sixteen hundred dollars, and bequeathed the remainder of

the income of his personal estate to his wife for life. At her death, he bequeathed a legacy of one thousand dollars to each of his six nephews, and other legacies, amounting to seventeen thousand dollars, to different charities. His will then directed that after his wife's death the residue and remainder of his estate should be divided among certain collateral kindred. His widow elected to take under the intestate laws, and against the will, and by agreement the annuities were capitalized, and paid out of the personal estate. This contest is to determine the manner in which the definite and residuary legacies should be paid..

*A. Sydney Biddle, E. F. Hoffman, G. W. Biddle, and H. G. Ward,* for the appellants.

*John G. Johnson,* for the appellees:

MITCHELL, J. These appeals are ruled by *Ferguson's Estate*, 138 Pa. St. 208, decided since the adjudication in the court below. That case was the necessary sequence of *Coover's Appeal*, 74 Pa. St. 143; *Gallagher's Estate*, 76 Pa. St. 296; and *Heineman's Appeal*, 92 Pa. St. 95; and these appeals might be rested on its authority. But out of deference to the opinion of the learned court below and the argument of counsel, we have reviewed the ground there taken as if the question were still open..

The widow's statutory rights in her husband's estate are paramount to his will, and he is presumed to know that fact. It is therefore not accurate to say that his whole scheme of disposition of his property is destroyed by the widow's election. It is disarranged *pro tanto*, but in the absence of any reference to such contingency, or provision for it in the will, there is ordinarily nothing on which to found a presumption that he would have made any specific difference in distribution had he known she would exercise her right; certainly not that he would have decreased any of the definite pecuniary legacies to swell the amount going at the end of the list to the residuaries. No court is authorized to make a new distribution for the sake of equality. The testator's scheme must be carried out as he made it, except so far as that has been rendered impossible by the widow's action, and in so far a court of equity interferes to preserve an intent which would otherwise be sacrificed. Such interference is the pure creation of equity, and had its origin in the doctrine of equitable election, which compelled one taking a benefit under a will to

acquiesce in other provisions of the same instrument which for any reasons were not binding upon him. Equity compelled him to elect, and if he chose to assert his prior rights against the will, the chancellor treated the provision of the will in his favor as forfeited, and then used the benefit created by such provision as a fund to be administered so as to carry out, as nearly as might be, the purposes of the testator which would otherwise fail.

In England, the point arose most frequently in cases where the testator, having only a life estate, or a qualified interest or power over the subject, undertook to dispose of a greater interest, to the prejudice of the legatee's legal right: *Streatfield v. Streatfield*, 1 White and Tudor's Lead. Cas. Eq. 840; and see the cases cited in Story's Eq. Jur., secs. 1082, 1083, note. In this country, such cases are rare; but the statutory rights of widows, as to personalty as well as dower, have frequently created the same situation, and the same doctrine has been uniformly applied. It was long a debatable question whether the refractory legatee forfeited absolutely all the benefits intended for him by the will, or only so much as might be required to make good that part of the scheme of the testator which his action had disappointed. The question can hardly be said to be entirely at rest yet; but though the foundation of the chancellor's action is a forfeiture by the assertion of a conflicting right, yet the better opinion now certainly is, that such forfeiture will be enforced only so far as may be necessary to make good the failure of the testator's other intent; in other words, it is forfeiture only for the purpose and to the extent of compensation.

The American cases, as already noted, arising chiefly from the assertion by a widow of her statutory rights against the provisions of the husband's will, have uniformly treated the benefits intended by the will for her as a fund which could be sequestrated and used as a trust to carry out the other provisions of the will. But the precise limits of the interference of equity, by way of rearrangement of the distribution of the decedent's estate, do not appear to have been much discussed. None of the cases cited by counsel touch the exact point, how far equity will interfere in behalf of mere residuary legatees, and such research as I have had opportunity to make has found but one. In *Firth v. Denny*, 2 Allen, 468, there was a fund provided for the widow for life, and after her death, one half of it to certain specified legatees, and the

residue of the estate, including the other half of the widow's fund, to trustees for charity. The widow elected to take against the will, and thereby took more than the fund set apart for her; but there was enough estate to pay all the definite legacies, and leave a balance for the residuaries. The court held that the ultimate loss must of course fall on the residuaries, but ordered the payment of the definite legacies to be postponed until the actual death of the widow, and the interest upon the fund in the mean time to be paid to the residuaries; and this was done, without question apparently, though the opinion says: "It does not appear exactly to what extent the election made by the widow left the residue of the estate less than it would have been if she had accepted the provision made in the will in her behalf." It was argued by distinguished counsel that the special circumstances showed that the residuary legatees, though lowest in the list, were in truth the chief objects of the testator's bounty; and as they seem to have been given the bulk of the estate, there was fair argument for such view, but the court did not put its decision on that ground. The opinion is not fortified by the citation of a single authority, nor is it reasoned out from principles. As already said, the result seems to have been accepted as the unquestionable consequence of the mere fact of the disappointment of the residuary legatees in the amount of the fund coming to them. It may be, however, that the doctrine of acceleration of the time of payment of legacies dependent on the life of the widow, by her election to take against the will, does not obtain in Massachusetts. The opinion of the court in *Brandenburg v. Thorndike*, 139 Mass. 102, looks in that direction, and if so, it is clear why the judge in *Firth v. Denny*, 2 Allen, 468, thought it unnecessary to go into reasons for the decision. It would, however, at the same time, be ample reason why *Firth v. Denny*, 2 Allen, 468, should not be authority in this state, where the doctrine of acceleration is firmly established: *Coover's Appeal*, 74 Pa. St. 143.

But the time of payment being held to be accelerated, sound reason requires us to hold that the widow's election shall be treated in all its results as equivalent to her death. The testator's disposition of his estate is interfered with *pro tanto*, but the court must carry it out as nearly as possible in all other respects. No departure from it can be admitted, except from necessity, and then only to the extent that necessity absolutely requires.



The amount of the legacies actually coming to the legatees is only one incident of a will. The order of precedence is another; and it does not seem necessary that the latter should be disturbed because of a change in the former. Hence no provision of the will ought to be interfered with by the court except for the preservation of one of superior, or at least equal, rank in the testator's scheme; and as residuary gifts are from their nature ordinarily the lowest in rank, no others can be interfered with for the sake of benefiting them. From their very definition, they come in last, and the testator, with knowledge of this fact, declares that they shall get nothing until after all others are paid in full. Mere diminution of the amounts coming to the residuaries does not in any way justify interference in the regular and established order of priority. When, therefore, it is said, as in *Sandos's Appeal*, 65 Pa. St. 314, that equity will sequester the benefit intended for the wife to secure provision for those who are disappointed by her action, the disappointment to be understood is the failure of the testator's intent in regard to other beneficiaries. These will be protected, not for their own sakes, but of necessity, in order to preserve the wishes of the testator; and such necessity does not extend to the interference with any beneficiaries prior in rank for the sake of the residuaries. One of the chances the latter take from the nature of their position is, that the share coming to them may undergo changes in amount before the period of distribution.

There is no force in the argument that the general pecuniary legatees have no cause of complaint at being postponed until the death of the widow, as their legacies, by the terms of the will, are not payable until that event, for neither are the residuary legacies. The advancement of the time of payment is the legal consequence of the termination of the purpose of the postponement, and both the definite and the residuary legacies share this advantage in common. To postpone the definite legatees, and transfer the income of their legacies to the residuaries during the widow's life, is not in furtherance of any direction of the will, but in direct violation of the testator's intent that the definite legacies should be paid in full before the residuaries get anything. Nor is it in pursuance of the equitable doctrine of sequestration of the benefits intended for the widow; for, as already said, that never ought to reverse the testator's order of priority. Nor does it even accomplish, except by accident, its

nominal purpose of preserving the relative amounts as they were at the testator's death. The exact figures in the present case we have not before us, but the possibilities of the plan adopted were shown very forcibly by the illustration of one of the appellants' counsel at the argument. If the general legacies were one hundred thousand dollars, and the residue at the time of the testator's death five thousand dollars, the sequestration of the interest on the former for the benefit of the latter would give the latter an income of one hundred per cent a year during the widow's life. Of course, no court of equity would apply the plan, without modification, to such a case, and the omission of the court, in *Firth v. Denny*, 2 Allen, 468, to require the exact figures was probably because it was understood all around that, even with the income during the widow's life, the residuaries would still be the losers. But such a possible result could only be avoided by a balancing of accounts in each case that would be beyond the sphere even of a court of equity. How far a sum in hand is preferable or otherwise to a larger sum at an indefinite future date, is a problem with too many elements of personal preference, necessity, and circumstance to be solved by a court upon the rates of interest and tables of the expectancy of life. As said in *Ferguson's Estate*, 138 Pa. St. 208, the law must have a settled and uniform rule, and it is, that as to provisions in a will for legacies subordinate to a life interest in the widow, and contingent upon her death, or payment of which is postponed till then, her election to take against the will is equivalent to her death. By such election, the widow takes her share as if the husband had died intestate, and the will then operates on the rest of the estate precisely as if the widow were dead. A court of equity will interpose, if necessity requires, to preserve the intention of the testator from destruction; but such interposition never should take place in favor of a subordinate as against a preferred or superior intent, and therefore never in favor of a residuary as against a definite legatee, unless upon a plain implication in the will that the residuary legatee was in fact a preferred object of the testator's bounty. There is nothing in the will of the testator, Vance, to require any departure from the general rule thus expressed.

Decree reversed, and record remitted for distribution to be made as herein indicated.

**WILLS — ELECTION OF WIDOW NOT TO TAKE UNDER A WILL.** — Where a widow renounces specific devises and bequests in her favor in her deceased husband's will, and elects to take under the law, the property renounced goes into the residue of the estate, to be administered as directed by the will: *Desecmon v. Shaw*, 70 Md. 220; *Carr's Estate*, 138 Pa. St. 352. Where the widow elects to take her statutory estate, which ceases at her death, such election does not create an intestacy as to the portion bequeathed to her: *Sullivan v. Kieffer*, 122 Pa. St. 135. A widow's failure to renounce the provisions of a will does not bar her of the right to inherit as an heir the property as to which her husband died intestate, where he has no children: *Wall v. Dickins*, 65 Miss. 655. Where a testator gave the use of all his property to his wife and five minor children till the youngest should attain his majority, after which the wife should have one third, and the residue should be distributed among all his eight children, the widow choosing to take one third absolutely, it defeated the testator's purpose to keep the family together, and the will became inoperative and non-enforceable, further than as to its provisions for making distribution among the devisees and legatees: *Howard v. Smith*, 78 Iowa, 73.

**LEGACIES — SPECIFIC AND GENERAL.** — The rule is, that specific legacies are payable before general ones: *Cooch v. Cooch*, 5 Houst. 540; 1 Am. St. Rep. 161; *Gallego v. Attorney-General*, 3 Leigh, 450; 24 Am. Dec. 650; *Ferguson's Appeal*, 138 Pa. St. 208; *Johnson v. Home etc.*, 152 Mass. 89.

## MEIGS v. BUNTING.

[141 PENNSYLVANIA STATE, 228.]

**JUDGMENT BOND AND MORTGAGE — PAYMENT AS TO THIRD PARTY.** — A judgment on a bond and a mortgage given for the same debt are distinct and separate securities, and as against the rights of third persons the payment of either extinguishes the debt and satisfies the other.

**JUDGMENT ON BOND AND MORTGAGE — PRESUMPTION OF PAYMENT AS BETWEEN PARTIES.** — A judgment on a bond and a mortgage given for the same debt are so far parts of the same transaction that the satisfaction of one is presumed to be a payment and satisfaction of the other, as between the parties, and puts the burden of proof on the creditor to show a different intent, or that the debt is not actually paid.

**SHERIFF'S SALE — PURCHASER — NOTICE.** — A purchaser at sheriff's sale is not bound to look into the facts of payment of a prior judgment and mortgage on the property sold, or the intention of the parties thereto, further than they have been made accessible to him on the record.

**SHERIFF'S SALE — RIGHTS OF PURCHASER.** — When a mortgage has been satisfied of record, and a judgment for the same debt is still apparently in force, a purchaser at a sheriff's sale may rely upon the record as conclusive evidence that the parties have exercised their right to maintain the judgment as a subsisting encumbrance on the property sold, and that such sale will discharge a subsequent mortgage. Nor is such purchaser affected by the pendency, at the time of the sale, of a rule to open the judgment.

the assured, such certificate is a sufficient compliance with the terms of the condition: *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90; *Lockwood v. Middlesex etc. Ins. Co.*, 47 Conn. 553.

Where the issue is raised that it is a badge of fraud that the insured did not furnish from the nearest magistrate a certificate of his loss, but furnished the certificates of other magistrates near by, the certificate of the nearest magistrate, reciting that he had examined into the loss, and believed it *bona fide* a total loss of goods, but had not had time to examine as to the exact amount of the loss, is admissible, though not a compliance with the policy, in failing to state the amount of the loss: *Petersburgh Ins. Co. v. Manhattan Ins. Co.*, 56 Ga. 446.

Where the policy requires that the insured must furnish with his proofs of loss a certificate of the value of such loss, but does not make the certificate an award, or stipulate that the insured shall be bound by his estimate, a statement by the insured in his proof of loss, fixing the amount at a certain sum, while the certificate of the magistrate, which formed part of such proof, states the loss to be a less sum, will not limit a recovery to the amount stated in the certificate, but the insured may establish the true amount of his loss by witnesses: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 598.

As to what is a compliance with the condition that the nearest magistrate or notary must certify to the loss, the rule was laid down at an early date that in determining the contiguity of the magistrate or notary to the place of the fire, the place of his business, and not his residence, will be regarded, and a nice calculation of distances will not be gone into to ascertain the nearest officer who might have given the certificate. The proximity of such officer to the place of the fire is all that can be required: *Turkey v. North Am. F. Ins. Co.*, 25 Wend. 374. This rule has been uniformly followed, and the reason therefor is given in *Williams v. Niagara F. Ins. Co.*, 50 Iowa, 561-565, to be, that "the provision in the policy that the certificate therein required must be given by the nearest magistrate or notary public was, without serious doubt, inserted for the purpose of preventing the insured from selecting the officer to perform such duty. While this is so, the provision must have a reasonable, instead of a literal, construction. It does not, we think, require that the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken. Nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer, nice distinctions as to the distance should not be indulged." So in *German American Ins. Co. v. Etherton*, 25 Neb. 505-510, it was said that "upon that subject we need only say that, in our opinion, it was not necessary that a careful and correct measurement of distances should be made for the purpose of ascertaining the nearest officer qualified to make the certificate." Again, in *American Central Ins. Co. v. Rothchild*, 82 Ill. 167, the court said: "We will enter into no calculation to ascertain whether the office or residence of the officer who made the certificate of loss as required by the ninth condition of the policy was a few feet nearer or more distant from the exact point where the fire occurred, than that of another notary or justice. It is sufficient if it appears the certificate was made by an officer of the character designated residing in the same locality. That is all this condition in the policy requires, when given a common-sense construction. Where there are several officers residing in the same immediate neighborhood, all of whom are competent to make the certificate of loss, that of either of them will be

a sufficient compliance with the condition of the policy, and a distance of a few yards therefrom from the scene of the fire will not be regarded as a matter of any importance whatever." Several decisions, however, seem to conflict somewhat with this rule, although in them no fine distinctions as to distance were sought to be drawn.

They maintain that, under such requirement, the certificate of the nearest officer of the classes named, whether magistrate or notary, is necessary, and that the certificate of the nearest magistrate, if a notary is nearer, is insufficient, and not a compliance with the condition. *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167; *Gilligan v. Commercial F. Ins. Co.*, 20: Han, 98; 87 N. Y. 626. Where the certificate of the magistrate who lived nearest the place of the fire, and who stated therein that he was not competent to appraise a portion of the property destroyed, was offered in evidence, and on objection another was offered, given by a magistrate whose residence was more distant, but whose office or place of business was nearer, than that of the other magistrate, and containing a compliance with all the stipulations of the policy, it was decided that the second certificate offered was admissible, and a compliance with the policy, and that in construing such condition fine distinctions would not be drawn as to distance, in order to enable the insurer to escape obligation on his valid contract through mere technicalities. *Agricultural Ins. Co. v. Beniker*, 70 Md. 400. Or where it appears that the nearest notary refused to act, on the ground that he was employed by the insurance company in ascertaining the facts and taking affidavits concerning the fire, the insured is relieved of the necessity of obtaining his certificate, and need not inform the insurer of the reason for obtaining the certificate of another notary: *Noon v. Transatlantic F. Ins. Co.*, 88 Cal. 152.

In this connection it may be stated that a notary public is not a magistrate within the meaning of a policy requiring a certificate of loss by a "magistrate nearest the place of fire": *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510; and that, under a statute in Maine, a condition in the policy requiring such certificate is void: *Bailey v. Hope Ins. Co.*, 56 Me. 474.

A condition in a policy that the nearest magistrate, notary, or other officer, not interested in the loss, nor related to the assured, must certify to the loss is only intended to secure an impartial arbitrator between the parties, — one who will neither gain nor lose, directly or indirectly, by the determination of their rights and obligations in respect to the loss. Consequently, in an action on such a policy, where it appeared that the nearest magistrate owned and occupied, as a residence and store, a building adjoining the premises burned, that he had no insurance on his property which was injured as a direct result of the fire, and that he had made complaint before a magistrate charging the insured with having set the fire, it was held that as his certificate as required by the policy would be almost conclusive against his right to recover his loss as against the insured, he was interested in the loss within the meaning of the policy, and that the certificate of the next nearest qualified officer was a sufficient compliance with the condition in the policy: *Wright v. Hartford F. Ins. Co.*, 36 Wis. 522. So where the nearest qualified officer is a mortgage creditor of the insured, and refuses to make the certificate, the certificate of the next nearest is a sufficient compliance with such condition: *Smith v. Home Ins. Co.*, 47 Han, 30. Such a condition in a policy means that the certifying magistrate must not be concerned in the loss by reason of having an interest in the property insured, or in the policy as security for a debt to him, and does not disqualify a magistrate from acting who is a general creditor of the assured: *Dolliver v. St. Joseph*

*etc. Ins Co.*, 131 Mass. 29. The certificate of the magistrate need not state upon its face that he is not related to the insured, nor interested in the loss, although such must be the fact: *Brwin v. Springfield etc. Ins. Co.*, 24 Ma. App. 145; and the statement therein that he is not related is sufficient until the insurer establishes to the contrary: *Cornell v. Le Roy*, 9 Wend. 163.

**WAIVER.** — When the policy requires the production of the certificate of an officer before the loss is payable, and no word or act has been done by the insurer to mislead the insured or throw him off his guard, mere silence does not create the inference of a waiver of this condition: *Mueller v. South Side Ins. Co.*, 87 Pa. St. 390. Nor does such waiver result from the fact that the assurer, after receiving a certificate which is not in compliance with the condition, enters upon an investigation as to the extent of the loss, without immediately objecting to the certificate, and offers to pay a certain amount: *Noonan v. Hartford F. Ins. Co.*, 21 Mo. 81. The production of the certificate is not waived by the insurer's agent receiving proofs of loss without objection to the omission of the certificate, in the absence of proof of authority in the agent to make such waiver. In one case it was held that the production of the certificate was not waived by the insurer objecting to pay the loss on other grounds, nor by the fact that proofs of loss have been in his hands for two years, without calling the attention of the assured to the absence and want of the certificate: *Daniels v. Equitable Ins. Co.*, 60 Conn. 551. Again, the mere delay of the insurer of thirty-seven days before requiring the certificate is not a waiver thereof, when the policy is not payable until sixty days after proofs of loss are received, and the assured does not claim that the delay prevented him from obtaining the certificate so as to begin suit at the expiration of that time, or that any other injury was caused by the delay: *Williams v. Queen's Ins. Co.*, 39 Fed. Rep. 167. On the other hand, the retention by the assurer, until the time of suit, without objection, of proofs of loss, otherwise proper, and accompanied by the certificate of a notary, instead of a magistrate, as required by the policy, will constitute a waiver of such defect: *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510.

The more rational decisions, however, show that the insurer must act in good faith; and cannot, after his seeming acquiescence in the proofs furnished, object that no certificate has been produced, or if produced, is defective in substance or in not being made by the proper magistrate or other officer. Thus if the insurer does not object within a reasonable time, as within two months, to the absence of the required certificate from the proofs of loss, he will be deemed to have waived all defects in such proofs: *Killipe v. Putnam F. Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506. So a delay of five months in objecting to the certificate furnished is a waiver of objection to its sufficiency: *Lockwood v. Middlesex Mutual Ins. Co.*, 47 Conn. 563. The insurer's neglect to object within a reasonable time to the proofs of loss, including the magistrate's certificate, when the defects therein could have been remedied if intelligently pointed out, amounts to a waiver of their insufficiency: *Mercantile Ins. Co. v. Holtzhaus*, 43 Mich. 423. So if the certificate is defective, the assurer will not be allowed to insist upon its insufficiency if he has refused to return it to the insured for the purpose of correction, and has failed to point out what he deems to be defects therein: *Turley v. North Am. Ins. Co.*, 25 Wend. 373; and when the only objection made to the proofs of loss is, that they do not contain the required certificate, and the insured has the right to furnish the certificate at a later date, the objection that proofs were not furnished in time is waived: *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389. All necessity on the part of the assured to furnish the certificate of loss

is waived by the company when it, immediately after the loss, renounces all liability therefor: *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562-569.

Where, instead of the certificate of the nearest magistrate as required by the policy, the certificate of a reputable citizen, not a magistrate, is received and assented to by the agent of the insurer as sufficient, the assurer waives all defects in the certificate, especially when he puts his refusal to pay the loss upon other grounds: *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50. So where a certificate of loss is furnished, to which no objection is made within a reasonable time, the assurer will be estopped from making objection to its sufficiency on the ground that it was not made by the nearest magistrate: *Nease v. Etina Ins. Co.*, 32 W. Va. 283. A letter from the assurer to the assured, objecting to the magistrate who signed the certificate, but not objecting to its form, is a waiver of any defect in the form: *Bailey v. Hope Ins. Co.*, 56 Me. 474. Where the policy provides that the certificate of loss of the nearest notary must be furnished if required, and such certificate has not been requested by the insurer at the time when proofs of loss were sent, he waives the right to claim, at the time of the trial, that the proofs of loss are insufficient because such certificate has not been furnished: *Jones v. Howard Ins. Co.*, 117 N. Y. 103. The provision in the policy concerning the production of the certificate is waived if the insurer, without objection, joins in submitting the loss to arbitration, and this, notwithstanding a provision in the policy that none of its conditions can be waived without the written consent of the insurer indorsed thereon: *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297.

## DOUD v. CITIZENS' INSURANCE COMPANY.

[141 PENNSYLVANIA STATE, 47.]

**INSURANCE—OCCUPANCY OF PREMISES.**—Where a building occupied by a tenant is insured under a policy prohibiting the vacating of the premises, and the tenant removes two days before the building is burned, while the insured takes possession and occupancy one day prior thereto, and leaves a person in charge during such time as is absolutely necessary to obtain and remove the goods of the insured from her home, seven miles away, which would have been completed on the day subsequent to the fire, such occupancy by the insured is part of a continuing occupancy, and her absence from the building only temporary and unavoidable, not amounting to an abandonment of occupancy, within the meaning of the policy.

**INSURANCE—OCCUPANCY OF PREMISES.**—Under a policy of insurance on leased premises, which contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy, without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises.

*P. P. Smith, and Connolly and Davis*, for the appellant.

*A. J. Colborn, Jr., and Samuel B. Price*, for the appellee.

GREEN, J. On the trial of this case, the plaintiff testified that she went to the house in question on Wednesday, the

**HARRIS v. SCHUYLKILL RIVER EAST SIDE R. R. Co.**

[141 PENNSYLVANIA STATE 262.]

**EMINENT DOMAIN — MEASURE OF DAMAGES.**— The measure of damages for the taking of land for railroad purposes is the difference between the value of the entire lot as it was just before the taking, and the value of what is left after the taking.

**EMINENT DOMAIN — ESTIMATION OF VALUE — EVIDENCE.**— In estimating the value of land before the taking for railroad purposes, its possible and probable uses are important elements, and may be shown by the opinions of experts; but the details of improvement, cost, or probable rental value afterwards are not admissible as independent facts; still, they ought to enter into the view of the expert in forming his opinion, and whether they have done so or not is a legitimate subject of cross-examination.

**EMINENT DOMAIN — ELEMENTS OF ESTIMATION OF VALUE.**— The value of part of a lot of land at the time of the taking for railroad purposes is the value as it was, not as it might have been with improvements; and the value of the rest of the lot after the taking is its value as it then is, not as it is when improved; and both values, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it, with other property in the neighborhood, consequent upon the coming of the railroad.

**EMINENT DOMAIN — ERECTION OUTSIDE OF LAND TAKEN CANNOT BE SET OFF AS IMPROVEMENT.**— The erection of a bulkhead by a railroad company, entirely outside of land taken as a right of way, cannot be claimed to be an improvement and benefit to the property, in order to reduce damages in an action to recover for its erection, unless authority is shown for erecting it. An agreement on the part of the land-owner that it shall be erected without cost or expense to him does not constitute such authority.

**EMINENT DOMAIN — ELEMENTS OF ESTIMATION OF DAMAGES — EVIDENCE.**— The presence of a sewer on land taken for railroad purposes is a fact affecting the condition and value of the land at the time of the taking, and whether or not the sewer was removed by the railroad company as a necessary result of the construction of the road, or by a city in cessation of a trespass, are also facts for the consideration by the jury in estimating damages. Consequently a record in ejectment by the lot-owner against the city tends to establish a trespass in maintaining the sewer, which it is bound to discontinue, and it is therefore admissible on the issue as to whether or not the sewer was removed by the city.

**DAMAGES.** H. G. Harris was the owner of the land in dispute, which constituted a lot of low land abutting upon the Schuylkill River, covered by tide-water, with a city sewer opening upon it. The city passed an ordinance for the extension of the sewer on condition that Harris would deed and dedicate one half the land required for the extension. This he did, but the city failed to make the extension, and Harris brought ejectment against the city and recovered the land



occupied by the sewer in its unchanged condition. Harris afterwards conveyed the land to A. G. Harris, and the railroad company, after giving a bond for damages, entered upon the land and constructed its road. In the course of such construction the railway company erected a bulkhead on plaintiff's land, entirely outside its right of way, to prevent the encroachment of tide-water. The railroad company claimed that the bulkhead was an improvement to the property, and should be so considered in estimating damages. It also claimed that it removed the sewer in the course of constructing its road, and that this was also an improvement to the property. The plaintiff contended that the bulkhead was erected without authority, and the maintenance of the sewer was a trespass and nuisance on the part of the city, which it was bound to abate. The plaintiff appeals from a judgment in his favor.

*Francis E. Brewster and M. Hampton Todd*, for the appellant.

*Thad. L. Vanderslice*, for the appellee.

MITCHELL, J. It has been said too often and too recently to require repetition that the true test of damages for the taking of land for railroad purposes is the difference between the value of the entire lot as it was just before the taking, and the value of what is left after the taking. Both parties to the present controversy admit this rule, but both sought at the trial to present evidence in violation of it. The appellee unfortunately succeeded.

In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge of the subject to insure the proper weight to be given, and the inferences to be drawn from them. Hence they are not admissible as independent facts for the jury, and the appellant's offers in that regard — as, e. g., to prove the cost of bulkheading this lot to make a wharf of it — were properly excluded. But such details ought to enter into the view of the expert in forming his judgment, and whether they have done so is a legitimate subject of cross-examination. Again, the value of the lot at the time of the taking is the value as it was, not as it might have been with improvements, though the availability for these is, as already said, an element in its value as it is. And the value of the rest of the lot after the

taking is also its value as it then is, not as it is when improved. And both values, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it, with other property in the neighborhood, consequent upon the coming of the railroad. Without going into the details of the numerous assignments of error on this branch of the case, it is sufficient to say that appellant's questions on cross-examination, as to the basis of the opinions of the appellee's experts, should have been admitted, and also that his objections to the opinions of the same experts upon the value of the property after the taking, that they were based on the value as an improved wharf lot, and also included elements of the general appreciation of values in the neighborhood, should have been sustained.

The main question, however, is upon the effect, as to damages, of the building of the bulkhead by the railroad company on the port-wardens' line. As this was entirely outside of the strip of land taken for the right of way, the company were bound to show some authority for putting it there. Otherwise it was a trespass, for which they were not only not entitled to claim that it benefited the property, but were liable in damages. The claim made at the argument that good engineering required the bulkhead to be put where it is only needs the obvious answer that if so, the company should have condemned that part of plaintiff's lot, and paid for it in the regular way. Their acquisition of the sixty-foot-wide strip for railroad purposes gave them no right to put retaining walls or abutments or bulkhead upon any other part of plaintiff's lot, and all contention to that effect must be dismissed from the case.

The only authority that defendant did show was the agreement of Harris, as set forth in the letter from Ellis to him, dated October 27, 1885. It is true, Harris wrote a letter in answer, in which he made a counter-proposition which he says was accepted, but which Ellis says was refused. For the purposes of this case, it is immaterial which is right. The counter-proposition stipulated, in a certain contingency, that the railroad company should keep the bulkhead in repair satisfactory to the port-wardens. No question as to which this would be relevant appears in the present case. The rest of Harris's proposition is no more than putting in express

terms, *ex majore cautela*, what was already in Ellis's letter. The terms of this were, that, in consideration of Harris, as owner, signing the application to the port-wardens, through which alone the necessary permission to build the bulkhead on the wardens' line could be had, Ellis agreed that the bulkhead should be built "without cost or expense to you [Harris] either for labor or material." Harris's answer added that "any supposed benefit to me shall not be alleged in mitigation of any damages . . . by reason of your taking your right of way over my property." It was argued that the expression "cost or expense, either for labor or material," meant only that Harris should not be called upon to pay out cash for the work. But this is too narrow a construction. It may be a convenience to be relieved from the necessity of a present outlay of money, but what substantial advantage is it, if the amount can be immediately afterwards deducted from money which would otherwise come to the owner of the land? If he has to pay for the bulkhead in either way, it is cost and expense to him which the company indemnified him against. The situation was this: the company had no authority to put the bulkhead outside of its own right of way; good engineering suggested that it should be put on the water line, and this could only be done by the owner's consent; the owner did consent, on the agreement that it should be done without cost or expense to him. The substance of the agreement is, that permission was given to build the bulkhead where it would be most useful, but it was to be done without expense, direct or indirect, to the owner of the land. The fair business sense of the words is the legal sense; and to hold that he should pay for it by diminution of the damages for taking his land would be a violation of both. All consideration of the location of the bulkhead at the wardens' line must be omitted in the estimation of the damages. The same reasons require that the questions to the experts to direct their attention to the effect of the construction of the railroad, including the necessary bulkhead, within the right of way, should have been admitted. It is true that the questions assumed a condition of circumstances which never in fact existed, but the agreement under which the location of the bulkhead was changed requires that the case should be treated as if these circumstances did exist.

The presence of the sewer, even though without right, was a fact affecting the condition and value of the lot at the time

of the taking by the railroad, and the evidence relative thereto was properly admitted. Whether the sewer was removed by the railroad company as a necessary incident or result of the construction of the road, or by the city in cessation of its trespass, was also a question of fact for the consideration of the jury, if there was any evidence to show that it was done by the railroad company; but the bill of exceptions, as printed, does not disclose any such evidence. The record in ejectment against the city was a step in establishing a trespass which it would be bound to discontinue, and had some bearing, therefore, on the question whether the sewer was in fact removed by the city. For that purpose it should have been admitted.

Judgment reversed, and *venire de novo* awarded.

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**EMINENT DOMAIN — MEASURE OF DAMAGES.** — For the rule of compensation, where land is taken under the right of eminent domain, see *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381; 19 Am. St. Rep. 452, and note 458-460; *Kersey v. Schuylkill etc. R. R. Co.*, 133 Pa. St. 234; 19 Am. St. Rep. 632; *Gainesville etc. R'y Co. v. Hall*, 78 Tex. 169; 22 Am. St. Rep. 42, and note 50, 51; *Denver City etc. Co. v. Mc'daugh*, 12 Col. 434; 13 Am. St. Rep. 234, and note; note to *Appeal of Sharon R'y Co.*, 9 Am. St. Rep. 144-147; *Ohio etc. R'y Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532, and note 537-540.

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## WOODS v. IRWIN.

[141 PENNSYLVANIA STATE, 378.]

**JUDGMENTS — REOPENING — EVIDENCE.** — A judgment cannot be opened except on competent evidence as a foundation therefor.

**JUDGMENTS CAN ONLY BE ATTACKED BY CREDITORS** or other strangers for fraud or collusion.

**JUDGMENT BY CONFESSION ON DEBT BARRED BY LIMITATION — EFFECT ON CREDITORS.** — A judgment honestly confessed by an executor, on a debt barred by the statute of limitations, cannot be opened by the creditors of the decedent, in the absence of allegation of fraud or collusion, for the purpose of letting in the defense of the statute, although the effect of the judgment is to diminish the fund for their payment.

**JUDGMENT BY CONFESSION BY AN EXECUTOR** on a debt barred by limitation is not a fraud on the creditors of the decedent.

**JUDGMENT SHOULD NOT BE OPENED** to let in the defense of the statute of limitations to one who has had his day in court, and does not allege any equitable circumstances.

*Montgomery Evans*, for the appellants.

*George W. Rogers and Charles Hunsicker*, for the appellees.

MITCHELL, J. The action of the court below in opening the judgment was irregular, inasmuch as it appears to have been done without evidence. There was a petition setting out certain facts, on which petitioners asked to have the judgment opened, to which the plaintiff filed an answer, denying some of the facts alleged and demanding proof of the others. No depositions appear to have been taken, nor any other evidence presented, so far as the record discloses, and the arguments seem to concede that the court acted on the petition and answer alone. It may be that this was done by general consent, but if so, the fact does not appear on the record. We notice the matter so as to avoid any implication of approval of such a course, unless by consent. The discretion of courts to open judgments is very extensive, but it must rest on a foundation of competent evidence.

But a much deeper objection is, that the court was without jurisdiction in the proceeding. There was no one before it asking for its action who had any standing. Neither plaintiffs nor defendant desired the judgment opened, and the court had no right to do it on motion of a stranger, not alleging fraud or collusion. True, the petitioners were creditors of the decedent's estate, and the judgment tended to diminish the fund for their payment. But this, of itself, gave them no right to interfere. It has long been settled that a judgment can only be attacked by creditors or other strangers for fraud or collusion, and, as already said, neither is alleged in the present case. The fact of there being a fund in the orphans' court which will be affected by the present judgment does not alter the general rule. Mere diminution of the fund gives no standing in that court, more than in any other: See *Law's Estate*, 140 Pa. St. 444, opinion filed at present term.

The learned counsel for the appellees, seeing the pinch of the case upon this point, have argued that it was a fraud in law for the executrix to confess the judgment. But this contention is not tenable. A debt barred by the statute of limitations is still a debt, though the remedy upon it be suspended or gone. Its force as an existing obligation, even though only moral, is such that a promise to pay is binding without other consideration. And the debtor may make such promise without regard to its effect upon other parties, even though creditors. In *Clark v. Douglass*, 62 Pa. St. 408, this court, through Sharswood, J., said that it was now fortunately well settled that creditors have no right to impeach a judgment on any

other ground than collusion; and in *Mestley's Appeal*, 102 Pa. St. 542, it was held that a judgment honestly confessed to a wife by an insolvent was good against creditors. If not for more than was due, it was not fraudulent, either in fact or in law, though there had been no agreement for interest on the money advanced by the wife, and such interest had been included in the judgment. In *Kess v. Kleckner*, 42 Pa. St. 529, it was expressly held that a debtor, even though insolvent, was not bound to interpose the defense of the statute of limitations (or the statute of frauds), and might confess judgment for a claim so barred, if the claim were honest, even though other creditors were defeated thereby. See also *Brown's Appeal*, 86 Pa. St. 524, and the analogous case of the defense of usury in *Second National Bank's Appeal*, 96 Pa. St. 460.

These cases establish beyond controversy that if Ninian Irwin, the debtor, had been alive in 1886, he could have confessed this judgment, and no creditor could have impeached it as a fraud in law. It is equally well settled that his executrix stands so far in his shoes that if satisfied the claim is honest, she is not bound to plead the statute of limitations. As there was no other defense, it follows that her confession of judgment was a prudent and proper course. She was doing no more than the testator might lawfully have done had he been alive. The debt was a moral obligation, which either the debtor, or his executrix acting in his place after his death, could convert into a legal one, and creditors have no more standing to complain in the one case than in the other.

It is true that in *Lewis v. Rogers*, 16 Pa. St. 18, Gibson, C. J., says: "Nor will I say that if he (the debtor) were to refuse to move for the benefit of his creditors, they would not be permitted to move in his name"; but he was speaking of fraud, as the next sentence shows: "An insolvent man is not suffered to give away his property by means of a judgment which, though proper at first, has become a security for less than the amount of it"; and his remark referred more to the form of the creditor's proceeding than to his right,—i. e., an attack on the judgment directly in the debtor's name, and not collaterally in his own. So, also, Justice Sharswood's remarks, in *Clark v. Douglass*, 62 Pa. St. 408, 415, 416, that the creditors of an insolvent could, even against a judgment, set up anything that the debtor could, had reference to fraud, as is apparent from the context and from the facts of the case

he had in hand. Even as *dicta*, these remarks were not intended to trench in any way on the settled rule, expressly reiterated in both those cases, that creditors can only interfere for fraud or collusion against them.

This result is not at all affected by the fact that the creditors in the orphans' court will have the fund diminished by the judgment. There is nothing in the doctrine of *Yorks's Appeal*, 110 Pa. St. 69, which is relevant. The right of the executrix to plead the statute of limitations in the orphans' court was established in that case. She has that right there and here. Creditors have no such right here, and she is not bound to assert hers for their benefit. As already shown, the debtor himself might confess judgment, no matter how much it diminished the creditor's chance of payment, and his representative stands in this respect in his place.

As these views upon the *status* of the petitioners are decisive of the case, it is perhaps not necessary to consider the ruling of the court below on the question of opening the judgment to let in the defense of the statute of limitations, but it may be well to do so briefly, to avoid misconstruction. The learned judge, in saying that it is no longer matter of dispute that a judgment should be opened for that purpose alone, went a step beyond any of the cases. The most advanced case that we have been referred to does not decide that the court should, but only that it may, do so. The plea of the statute, though no longer an object of animadversion, is not yet the object of favor. As a matter of public policy, recognizing that in the ordinary course of business life just debts are pursued with diligence, and that witnesses die and papers are lost, the statute is one of repose and protection. But, speaking for myself, I cannot regard the statute, unaided by any equitable conditions or circumstances, as other than a dishonest defense, for which alone a judgment should never be opened. But however that may be as a matter of discretion with the court in each case as it arises, no case certainly has been brought to our attention in which a judgment has been opened for this purpose only for a defendant who has had his day in court. The cases specially relied on by the court below and by appellees (*Herman v. Rinker*, 106 Pa. St. 121, *Sosong v. Rosar*, 112 Pa. St. 197, and *Ellinger's Appeal*, 114 Pa. St. 505) were judgments entered on warrants of attorney fourteen, ten, and eleven years old, respectively, and in all of them there were other circumstances besides the mere lapse

of time set out as grounds of the application. But the action of the court was based, as is very clearly set out by our brother Green in *Sossong v. Rosar*, 112 Pa. St. 197, on the fact that the defendant had had no hearing. If, on a suit in the usual course, the defendant comes in and confesses judgment, he could hardly be heard afterwards to say the debt was barred by the statute. He has made an acknowledgment of record that the debt is due, and that he will pay it. As already shown, what the debtor might have done his executrix may do in his place; and even if she had thereafter asked for the opening of the judgment, it could not have been granted without some equitable grounds to aid it. It is unnecessary to consider the offers of evidence at the trial.

Judgment reversed, order opening original judgment rescinded, and that judgment reinstated.

**JUDGMENT — REOPENING.** — A regularly enrolled decree cannot be opened or altered except by a bill of review: *Note to Millsbaugh v. McBride*, 34 Am. Dec. 362. A consent decree cannot be set aside even by a bill of review, except for fraud, unless it is shown that the consent was not really given to the decree as actually entered: *Knobloch v. Mueller*, 123 Ill. 554. Judgments by confession will not be opened to let in a defense, when it is not shown that a defense can in fact be successfully made: *Holmes v. Parker*, 125 Ill. 478. That the attorney exceeded his authority in confessing a judgment, by waiving defendant's right of appeal, is not sufficient cause to justify setting the judgment aside, when defendant really has such rights: *Hansen v. Schlesinger*, 125 Ill. 231. The district court has extended discretion to set aside or open judgments during the same term at which they were entered: *State v. Sowders*, 42 Kan. 312. Judgments by confession may be stricken out for surprise and mistake, even after the lapse of the term at which they were rendered: *Heape v. Hoopes*, 68 Md. 383.

**JUDGMENTS — DEFENSES TO.** — No defenses can be made to a judgment which could have been reasonably interposed before the judgment was rendered: *Snow v. Mitchell*, 37 Kan. 636.

**JUDGMENTS — WHO MAY ATTACK.** — None but the parties thereto, or such as have some legal or equitable interest affected thereby, can complain of a judgment or decree: *Bank of Utica v. Mercereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189; *Gardner v. Bunn*, 132 Ill. 404. In the absence of fraud or collusion, creditors cannot attack a judgment by confession: *Collins v. Cronin*, 117 Pa. St. 35. See *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271, and note. One not a party, nor one against whom it is enforceable, cannot use a judgment for his own benefit or to the disadvantage of others: *Lord v. Locke*, 62 N. H. 566.

**JUDGMENT BY CONFESSION — STATUTE OF LIMITATIONS.** — The confession of a judgment may constitute such an acknowledgment of a debt as to take the case out of the statute of limitations: *Schaferman v. O'Brien*, 28 Md. 565; 92 Am. Dec. 708; *Hoyer v. Pruyn*, 1 Paige, 465; 24 Am. Dec. 355.



## TYSON v. EYRICK.

[41 PENNSYLVANIA STATE, 283.]

**VENDOR AND VENDEE — PAROL CONTRACT FOR SALE OF LAND — FAILURE OF TITLE — RIGHTS OF VENDEE.** — Where, under a parol sale of a lot as containing fifty front feet, the vendee has paid part of the purchase-money and has gone into possession, and the lot is subsequently measured as containing fifty front feet, but there is a failure of title to the extent of one foot because of an honest mistake by the vendor as to the true boundary in making the measurement, the vendee may rescind, or when sued for the remaining purchase-money he may recoup damages for failure to obtain title to the one foot to which he was entitled under his contract of purchase.

**VENDOR AND VENDEE — PAROL CONTRACT FOR SALE OF LAND — FAILURE OF TITLE — MEASURE OF DAMAGES.** — Where, under a parol contract for the sale of a lot as containing fifty front feet, there is a failure of title to the extent of one foot, because of an honest mistake as to the true boundary, the measure of damages to which the vendee is entitled, when sued for the purchase-money, is the relative value that the part to which he fails to get title bears to the whole lot as estimated with regard to the price agreed upon for the whole. While the peculiar advantages or disadvantages of the part lost with reference to the whole may be considered as at the time of the purchase, still the additional expense of erecting improvements on an adjoining tract, incurred by reason of the defect in the title in order to have the reasonable and proper enjoyment of the remaining portion of the land, must not be considered in allowing such damages.

*John G. Johnson and R. T. Cornwell*, for the appellants.

*H. H. Gilkyson*, for the appellee.

**CLARK, J.** This action was brought to recover the balance of purchase-money upon a parol contract for the sale of a lot of ground fifty feet in front on Main Street, in the borough of Phoenixville, the title to which is in the plaintiffs, as trustees for the Phoenix Iron Company. The contract was made with the defendant on the first day of September, 1888, through one Armory Coffin, the chief engineer of the company. The terms of the contract are stated in a memorandum contained in the chief engineer's note-book, as follows: "9—1—88; Mr. James R. Eyrick agrees to take the fifty-foot lot on Main Street, south of Farmers' and Mechanics' Bank, for the price of \$6,000, viz.: \$2,000 cash, and the balance on mortgage, payable at will; \$500 check, and \$1,500 when papers are prepared." The hand-money was paid at the time to the treasurer of the company, and Mr. Eyrick shortly afterwards entered into the possession.

The company actually did have a lot fifty feet in front, sit-

uate as described, and if the matter had so remained there would probably have been no difficulty. But when Coffin came, a month or more later, at Eyrick's request, to measure and stake it off, he, by mistake, embraced a foot of ground on one side of the lot which did not belong to the company, and excluded a foot on the other side which did, and this gives rise to the whole controversy. The plaintiffs tendered a deed for the fifty feet they own and can convey, but the defendant demands a conveyance of the fifty feet of ground that was staked off to him, assigning as a reason that otherwise he cannot have the convenient use of one of the buildings which he has since erected. He alleges that, relying upon the location of the center line of the lot by Coffin, he erected a three-story brick double dwelling, on each side of which he had designed a three-foot passage-way, and that, by reason of the mistake, one passage-way is but two feet wide, and is inconvenient and unsuitable for the purpose intended.

The sale and the subsequent designation of the boundaries, although distinct in time, were, we think, component parts of the contract, and Eyrick had a right to insist upon a title in conformity therewith. The lot was staked off fifty feet in front, and ninety-five feet in depth. Mr. Eyrick says, in speaking of this: "He (Coffin) measured back one hundred feet, and he looked across, and he said that it ran beyond the bank line, and he said it was one hundred feet more or less, and he gave me five feet less." The lot was staked off to the same depth as the bank lot; it is not pretended that the lot was to extend farther back. The complaint is, that the officers of the company told him the lot was fifty by one hundred feet, but when it was discovered upon actual measurement that it was only ninety-five feet in depth, Eyrick made no objection; he accepted the lot according to the lines measured and staked off, and now insists that the conveyance shall be made accordingly. Nor was anything said, at or prior to this time, as to an alley in the rear. If the measurement and designation of the front line of the lot is binding upon the parties, the designation of the line in the rear is equally binding, and we can see no ground for this feature of the controversy. It is true that a private map in the office of the Phoenix Iron Company shows an alley in the rear of this lot in question, but it does not appear that this or any other of the company's lots, excepting only the bank lot, was sold with reference to this plat, and we cannot see that the defend-

ant has any claim to the alley, or to more ground than was actually staked off to him. If he has a right to hold the company to the side lines of the lot as staked off, he is certainly bound by the lines in the front and rear marked off and designated at the same time. He cannot play fast and loose in this respect; his claim must be consistent. If he wanted the use of an alley in the rear, he should have bargained for it, and there is no evidence whatever of any understanding or agreement to that effect. On the contrary, it appears that when a deed was tendered, as a compromise, containing a grant of the alley, Eyrick treated it as of little consequence, for the reason, as he says, that "a blind alley is a nuisance." It was not until much later, in their negotiations for settlement, that he asked them to extend the alley in an L shape to Jackson Street. The court erred in submitting to the jury any question of damages as to a deficiency in the depth of the lot. There was no evidence to justify such a submission. This part of the defendant's claim is, in our opinion, wholly inconsistent with the only theory of the case upon which the defendant is entitled to anything by way of damages, and should have been excluded.

The case is therefore narrowed to a consideration of the proper measure, according to which the defendant is entitled to recoup damages for failure of title as to the one foot on the south side of the lot. That the mistake was an honest one, that the plaintiffs acted throughout the transaction in good faith, is beyond question; there is no proof to any other effect. There is evidence, on the contrary, tending to show that they were willing and offered to do what they could to remedy the wrong which had been done to the defendant. Upon discovery of their mistake, they were prompt in their efforts to make amends; they tried to purchase one foot off the Shaffer lot, covering the interference; failing in this, they offered to convey the fifty feet they had title for, and to embrace the alley in the rear. There is evidence, also, that, immediately after the discovery of the mistake, and when they failed to get one foot off the Shaffer lot, they offered to move the walls of the building then under construction one foot nearer to the line of the bank lot, at their own expense; but this is denied. All this testimony, with that of a more direct character, bears upon the question of good faith; and whilst there is much proof to this effect, there is none to the contrary.

We have, then, the parol sale of a lot, measured and

marked on the ground as containing fifty feet front, and a failure of title to the extent of one foot; the failure resulting from an honest mistake as to the true boundary. What is the true measure of damages in such a case?

The law of Pennsylvania on this subject is certainly well settled. Where the contract is executed by deed, with covenants of general warranty of title, the rule undoubtedly is, that the measure of damages for failure of title, in the absence of fraud, is limited to the purchase-money and interest, or in other words, to the price of the land at the date of the deed, whether the consideration consist of services, land, or money: *Bender v. Fromberger*, 4 Dall. \*436; *Brown v. Dickerson*, 12 Pa. St. 372; *McClure v. Gamble*, 27 Pa. St. 288; *McClowry v. Croghan*, 1 Grant Cas. 311; *Lanigan v. Kille*, 97 Pa. St. 120; 39 Am. Rep. 797. The rule is founded, in part, probably, in the ancient law of warranty, which gave to the party evicted a judgment against his vendor for lands of equal value to those conveyed: 2 Kent's Com. 477. Interest is added to the amount of the consideration, unless the land is improved and the purchaser has been in the possession. In such case, the claim for interest is extinguished, except for that part of the time for which the purchaser is liable to mesne profits: *Cox v. Henry*, 32 Pa. St. 18; *Patterson v. Stewart*, 6 Watts & S. 527; 40 Am. Dec. 586; *Wacker v. Straub*, 88 Pa. St. 32.

In executory contracts generally, the law recognizes and enforces the right of the purchaser to a title clear of defects and encumbrances, and this, except in particular cases, is not affected by the nature and extent of the covenants for title which the purchaser is to receive: Rawle on Covenants, sec. 319. In *McNair v. Compton*, 35 Pa. St. 23, it was held that for breach, without fraud, of a real contract in writing, the measure of damages is to be determined by the consideration that passed between the parties; whether the contract be executed or executory, this is the rule. If the consideration consist of services rendered, they are to be computed according to their value; if money received, it is to be returned, with interest. So, also, in *Hertzog v. Hertzog*, 34 Pa. St. 418, — an action for the breach of a parol contract for the conveyance of land in consideration of money paid and services rendered, — it was held, overruling *Jack v. McKee*, 9 Pa. St. 235, and kindred cases, that the damages are to be measured by the amount of the consideration, and not by the value of the land. To the same effect are *Dumars v. Miller*, 34 Pa. St. 319; *Graham v.*

*Graham*, 34 Pa. St. 475; *Bowser v. Cessna*, 62 Pa. St. 148; and *Burk v. Serrill*, 80 Pa. St. 413; 21 Am. Rep. 105. The damages cannot be measured either according to the value of the contract, or the increased value of the land by reason of buildings erected or improvements made. Where the eviction complained of is partial, the recovery is proportioned to the value of the part of the premises to which the title has failed. It is competent to show that the part to which the title has failed was inferior or superior in quality to the other portion conveyed, and the true measure of damages is the value of that part taken in proportion to the price of the whole, the computation being upon the basis of the consideration money: *Lee v. Dean*, 3 Whart. 331; *King v. Pyle*, 8 Serg. & R. 166; *Beaupland v. McKeen*, 28 Pa. St. 124; 70 Am. Dec. 115; *Terry v. Drabenstadt*, 68 Pa. St. 400. In *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115, the rule for estimating damages for failure or defect of title to a part of the land conveyed was held to be the relative value which the part taken away bears to the whole, and that is to be estimated with regard to the price fixed by the parties for the whole land; and whilst, in such cases, it is competent for either party to give evidence of peculiar advantages or disadvantages of the part lost with reference to the whole at the time of the purchase, it was held that the additional expense of erecting improvements on an adjoining tract, incurred by reason of the defect in the title, in order to have the reasonable and proper enjoyment of the remaining portion of the land, was not allowable as damages.

The defendant's contention is, that he bought the ground which was staked off to him, and that he is entitled to a conveyance for the land he bought. The plaintiffs are not able to convey but forty-nine feet of the fifty they agreed to sell. Their inability arises out of no bad faith or fraud on their part; their contract, for anything that appears, was made honestly, but through mistake as to the lines of their lot. The title to the specific subject of sale is to this extent defective. The defendant, upon discovery of this defect, made no offer to rescind; on the contrary, after he knew the plaintiffs were unable to comply with their contract, he continued to pay the purchase-money and to proceed with his improvements. He is entitled, therefore, merely to an allowance for the proportionate value of the one foot of ground, to be computed upon the basis of the consideration of his contract. He can-

not be allowed damages for the misplacement of his building; it was his duty, before expending his money upon valuable improvements, to ascertain and know his lines, and to locate his buildings accordingly. The Phoenix Iron Company, or its trustees, are responsible, upon the footing of their contract, for the title to the lot as it was when they sold it, to the extent of the purchase-money; but the defendant, upon the principle of *caveat emptor*, took the risk of the title as to the improvements which he put upon it. If this were not so, the vendor in very many cases would be ruined by the purchaser's improvements. If it seem hard that a purchaser, acting in good faith, should lose his improvements, it is equally hard that a vendor, also acting in good faith, should have to pay for them: Rawle on Covenants, secs. 166, 168.

We are of opinion that the first, second, fifth, and sixth assignments of error are sustained. This is the plaintiffs' appeal, and we dispose of it as it is presented upon the assignments of error; it can therefore only be regarded as authority upon the specific questions decided.

The judgment is reversed, and a *venire facias de novo* awarded.

**VENDOR AND VENDEE—CONTRACT FOR SALE OF LAND—FAILURE OF TITLE—RIGHTS OF VENDEE.**—A purchaser under an option for the sale of real estate, upon learning that the vendor is not the owner of the whole title, may rescind the contract and recover the money paid: *Burks v. Davis*, 85 Cal. 119; 20 Am. St. Rep. 213, and note; *Moore v. Williams*, 115 N. Y. 596; 12 Am. St. Rep. 844, and extensive note. Where a vendor's title fails to part of the land sold, the measure of abatement which the vendee may claim is such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract: *Heavner v. Morgan*, 30 W. Va. 335; 8 Am. St. Rep. 55, and note. One who sells property on a description given by himself is bound to make good that description, and will be liable in damages for any variance: *McCall v. Davis*, 56 Pa. St. 431; 94 Am. Dec. 92. A vendor's title must be beyond doubt, or he cannot compel the purchaser to pay the purchase-money: *Gans v. Renshaw*, 2 Pa. St. 34; 44 Am. Dec. 152, and especially note. Where there is a failure in the quantity of land sold, the purchaser is entitled to recover for the deficiency: *Hays v. Hays*, 129 Ind. 92. Where there is a mistake as to the quantity of land sold, and a suit to recover the contract price, the purchaser's right is strictly to compensation, and not to abatement in price proportionate to the surface deficiency: *Wassler v. Boyd*, 69 Tex. 293.

## RIEGELMAN v. FOCHT.

[41 PENNSYLVANIA STATE, 303.]

## STATUTE OF FRAUDS — PAROL PROMISE TO FOREGO EVICTION OF TENANT.

— An oral promise by a third person that he will pay the accruing rent to the landlord if the latter will forbear the eviction of the tenant for the non-payment of the rent, and permit him to remain to the end of the term, does not create a new debt on the part of the promisor, but is within the statute of frauds and void, as a mere promise to pay the debt of the tenant.

*John H. Rothermel*, for the appellant.

*D. N. Schaeffer and J. H. Marx*, for the appellee.

GREEN, J. In any aspect of the testimony in this case, the promise upon which the suit was brought was a verbal promise to pay the debt of another, and therefore void under the statute of frauds.

The original letting of the premises in question was admittedly made by the plaintiff to James S. Focht. Daniel Focht, the defendant, was in no sense a party to that contract. The letting was for one year, and under it James S. Focht moved into the house, and continued to live there until the end of the term. He paid part of the rent, — seventy-five dollars, — and it is not claimed by the plaintiff, nor is it the fact, that the plaintiff at any time released him from his obligation to pay the remainder of the rent. On the contrary, the plaintiff testified that "Jim," his tenant, still owed him the \$125, balance of the rent, at the trial. He was asked: "Q. Then James S. Focht paid you \$75, and still owes you \$125? A. Yes, sir, — Jim; but he did not pay it on the bargain, and he owes me \$125 yet. Q. Jim Focht paid you \$75, and owes you \$125; is that so or not? A. I rented it to him for \$200. Now, it is easy to know how it is." The plaintiff's own testimony as to the defendant's promise was, that he asked him, the plaintiff, to let Jim remain on the premises, and that he, the defendant, said he would pay the rent monthly or quarterly, as he desired. "Q. Did you at that time threaten to evict James Focht? A. I said if he did not pay his rent or give bail I would evict him. Q. What was Daniel Focht's answer at that time? A. Dan Focht said, then, I should leave him remain, and that he would pay the rent monthly or quarterly, as I desired. Q. What did he do then? A. He remained there till the end of the year. Q. What did

you say to Daniel Focht? A. Then I left him live there. Upon the old man's promise, I left him live there. I cannot answer what answer I gave. It is so long ago I have forgotten it." Thus it will be seen that the whole of the plaintiff's case, according to his own testimony, was, that he would forbear an eviction of the tenant, and let him continue to live on the premises to the end of the term, upon the defendant's promise to pay the rent.

It is really too plain for argument that this is not the creation of a new and independent debt of the promisor alone, but a mere promise to pay the debt of the tenant, who was to continue to occupy the premises until the end of the term; and this is precisely what he did. No change took place in his relation to the plaintiff as his tenant. He still continued liable for the accruing rent, and the plaintiff so testified. Of course, no relation of tenancy between the plaintiff and the defendant ever arose, nor was there the slightest pretense that it did, or that anything was said between them on that subject. The defendant received no consideration of any kind for his promise, except such as would arise from the fact that his son was permitted to remain on the premises. There is no testimony in the case which in any degree improves that of the plaintiff himself. The debt of the tenant remained; there was no extinguishment of it, and no substitution of any other debt in its place; there was nothing but the collateral, verbal promise of the defendant to pay it; and, under all the authorities, such a promise is within the operation of the statute of frauds and perjuries.

Said Mr. Justice Strong, in *Maule v. Bucknell*, 50 Pa. St. 39: "In note 1 to *Forth v. Stanton*, 1 Wms. Saund. 211 e, it is said: 'The question whether each particular case comes within the clause of the statute or not depends, not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' The doctrine of this note is supported by very many cases, and it is in harmony with the words of the statute." In *Nugent v. Wolfe*, 111 Pa. St. 471, 56 Am. Rep. 291, our brother Sterrett said: "As a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or



at the time with the promise of the principal, is within the statute, and not binding, unless evidenced by writing." In the note to *Birkmyr v. Darnell*, 1 Smith's Lead. Cas., 8th ed., 459, it is said: "It is universally conceded that forbearance to proceed against the estate or person of the debtor, though a good consideration, is insufficient to avoid the statute"; citing many cases in support of the principle. The doctrine is well stated in 9 Am. & Eng. Ency. of Law, 73, as follows: "If the evidence shows that the party who receives and profits by the consideration is liable, and may be sued for the debt in *assumpsit*, or that credit was given primarily to him in any form, the case will fall within the statute, and no recovery can be had on a collateral promise, unless reduced to writing, or based upon a distinct and independent consideration moving to the promisor."

It is unnecessary to multiply authorities upon these familiar principles, which are directly applicable to the facts of this case. The case of *Merriman v. McManus*, 102 Pa. St. 102, which is cited by the appellee, is not at all in point, as its facts are entirely different. There the work under the original contract had ceased, because of the insolvency of the party who was liable originally. But it was essential that the work should proceed, and the parties interested in the completion of the work made a new and independent agreement with the plaintiff to go on and finish the work, and they would pay him for it. The work was thereafter done, and of course the defendants were held bound to pay for the work subsequently done under their contract to pay for it. We are of opinion that the learned court below was in error in the portion of the charge embraced in the third assignment of error. It was, in effect, a direction that if the defendant's promise to pay was based upon the plaintiff's agreement not to eject the tenant, the plaintiff might recover. We do not so understand the law. The assignments of error are all sustained.

Judgment reversed.

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**STATUTE OF FRAUDS — PAROL PROMISE TO PAY DEBT OF ANOTHER. —** The promise to pay the debt of another is within the statute of frauds, and must be in writing: *Wolberton v. Davis*, 85 Va. 64; 17 Am. St. Rep. 58, and note; *Clark v. Jones*, 87 Ala. 474; 85 Ala. 127; *Cheesman v. Wiggins*, 122 Ind. 352. But where promisor's purpose is, not so much to answer for another as to derive some benefit for himself, or damage the other contracting party, the promise is not within the statute of frauds: *Crawford v. Edison*,

45 Ohio St. 239; *Benbow v. Southamith*, 76 Iowa, 151; *Clark v. Jones*, 37 Ala. 474.

In *Moses v. Norton*, 36 Mo. 113, 55 Am. Dec. 738, the rule that promises to pay the debt of another must be in writing is applied to a promise by a son to pay rent on the premises occupied by his mother.

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## CLOSE v. ZELL.

[141 PENNSYLVANIA STATE, 390.]

**VENDOR AND VENDEE — PAROL CONTRACT OF INDEMNITY — ENFORCEMENT OF, ON FAILURE OF TITLE.** — A parol contract by a vendor to refund the purchase-money on a failure to give title, and to repay all costs and expenses incurred, is not merged in a deed subsequently executed, with a covenant of special warranty, but no covenant of title. Such contract survives the deed, and confers an independent cause of action, enforceable upon a failure of the title.

*Josiah Funck and H. Willis Bland*, for the appellants.

*D. E. Schroeder and G. B. Stevens*, for the appellees.

GREEN, J. In the second count of the plaintiffs' statement, their cause of action is substantially set out as a parol contract of indemnity against a defective title to certain real estate conveyed to the plaintiffs by the defendants' testator, which was the operative inducement to the plaintiffs to purchase the title from their vendor. The deed contained the usual covenant of special warranty, but no covenant of title, and as there is no breach of any covenants of the deed, no cause of action arises under it. This proceeding is therefore not in any sense a proceeding to change, alter, modify, or reform the deed in question in any respect. It is not alleged or claimed that any covenant or stipulation was omitted from the deed by fraud, mistake, or accident, but the deed, just as it is, is set forth in the statement in substance, together with an allegation that the grantor agreed with the plaintiffs, at the time of the sale and the delivery of the deed, that he would refund to them the whole of the consideration money paid by the grantees to the grantor, and all interest thereon, and all costs and expenses incurred, in the event that the grantees should not acquire, under the deed, a good title to the premises sold. The question arises, whether such a contract is merged in the deed subsequently executed, or whether it survives the deed, and confers a cause of action which may be enforced upon a failure of the title.

It will be observed that the contract, which in this case was verbal, precedes and is independent of the deed. It stipulates for indemnity against the consequences of the taking of the title conveyed by the deed. If, notwithstanding the deed and the title thereby sought to be conveyed, the grantees subsequently sustained loss by reason of the fact that they acquired no title by the deed, is there any legal reason why they cannot recover from the grantor the money which he had received from them, and which he promised he would refund to them in case the title failed? This is a question which has been several times adjudged by this court.

In *Drinker v. Byers*, 2 Penr. & W. 528, we held that a guaranty of title, executed and delivered by a vendor to a vendee, is not merged in a subsequent deed of conveyance which contains only a special warranty. The facts there were, that Henry Drinker, having sold two tracts of land to Jacob Byers, before the deed was executed, signed and delivered to Byers a statement or stipulation in these words: "It being represented to me by John Nisely and Jacob Byers, who have purchased two tracts of land of me situate on Bald Eagle Creek, that a certain Derrick Gonsalus makes some pretensions to part of the said two tracts, although I am well persuaded he has no just claims or rights to any part of the said land, yet, for the satisfaction of the said Nisely and Byers, I hereby engage that I will be answerable to them for any claim or demand of the said Gonsalus; that if it should appear hereafter there is any justice in his claim, I will indemnify and save harmless the said Nisely and Byers on that account." Byers accepted, a few days later, an executed deed for the premises from Drinker, and gave him a mortgage for part of the purchase-money; and upon a *scire facias* on the mortgage, made defense that Gonsalus had recovered on his title a large part of the land conveyed by the deed, and sought to defeat the mortgage on the ground that the part of the land that was lost was of more value than the whole amount of the mortgage. Objection was made to the agreement for indemnity, that it was merged in the deed and conferred no right of action, but the court below and this court decided otherwise, and judgment was entered for the defendant. Mr. Justice Kennedy, in delivering the opinion, said: "In the next place, it has been insisted on that the execution and acceptance of the deed of conveyance was a consummation of all previous agreements between the parties relating to the purchase of the

lands; that this collateral promise of indemnity was thereby waived, and that the vendor was discharged from his obligation under it. It is certainly true that when articles of agreement for the sale of land are carried into execution by a conveyance from the vendor and bonds from the vendee, the contract, in general, is considered as closed, unless in extreme cases showing gross misapprehension or fraud [citing several authorities]. This, however, is but a general rule, to which there are exceptions: See *Brown v. Moorhead*, 8 Serg. & R. 569; and is founded merely on presumption, which may, as I apprehend, be rebutted by circumstances or parol evidence. In the case of *Frederick v. Campbell*, 13 Serg. & R. 136, parol evidence was held admissible to show that at the time the deed was executed, the vendor declared to the vendee that he had a good title to 225 acres, and would warrant that quantity of land, the deed containing no such covenant or warranty. In the present case, although the promise of indemnity does not appear to have been made at the time of executing the deed of conveyance, yet its date is only three weeks anterior, and would appear from its terms to have been made some time after the agreement for the sale of the land. . . . It might perhaps, therefore, be reasonably inferred that the vendee, having received this promise of indemnity but a few days before the deed of conveyance, relied upon both as his security, and was induced thereby to give his bonds and mortgage for the payment of the balance of the purchase-money."

In the case of *Richardson v. Gosser*, 26 Pa. St. 335, we held that where a vendor who conveys to his vendee by deed of general warranty, promises to indemnify him for any improvements he may make upon the premises, in the event of the title proving worthless such promise is not *nudum pactum*, but will support an action of *assumpsit*. The deed did not alter the situation of the parties in this respect, being entirely distinct from the contract sued on. Black, J., after stating the facts of the case, said: "This suit is brought by B (the vendee) against A (the vendor) for the expense of improvements put on the land by the plaintiff both before and after the date of the conveyance. It was proved on the trial that A promised to pay B for the improvements, in case the title failed. This promise was often repeated before the improvements were made, at the time they were in progress, and after they were finished, and as well previous to the deed as subsequently. The plaintiff knew the title to be doubtful, and it is

apparent that he would not have expended his labor and money as he did, except on the faith of the defendant's promise to keep him harmless. It is hard to see how we could deny the plaintiff's right to recover, and at the same time satisfy the demands of common justice. The transaction between these parties was a plain contract on a subject-matter which no law forbade them to bargain about in any way they pleased. We can scarcely conceive of another case in which more palpable wrong would be wrought, or a worse example set, by suffering an agreement to be broken with impunity. The defendant's promise was not *nudum pactum*. The consideration was sufficient. It is true that, as things turned out, neither of the parties received any benefit from the improvements; but that was not the plaintiff's fault. . . . Here was a person making a purchase of land. He had so little faith in the title that he would neither pay the purchase-money nor make improvements which were necessary to its profitable use, without some guaranty against the ultimate loss of his whole outlay. But he had confidence in his vendor, and was willing to accept his personal warranty in place of a good title. The vendor gave him that by his covenant in the deed, and by his parol promise that he should not lose a dollar. When the title failed, the vendee had a right to fall back on the retreat which both had agreed to provide for him. . . . The deed did not alter the situation of the parties, or make any change in the title, for the grantor had no title to convey. At all events, it was a totally distinct thing from the bargain on which this suit is founded. . . . It is urged that this contract about improvements was merged in the deed. . . . But to us it appears that the contract on which this suit is founded has no such relation to the deed referred to. It does not concern the sale or the transfer of the title. It is a promise to do another thing."

The foregoing cases have been extensively quoted because they fully illustrate everything necessary to be considered in disposing of the present case. In both of them, the contract, as in this, was for indemnity against a defective title. In the last, there was a special, verbal agreement to compensate for the cost of improvements in case the title failed; and although there was a general warranty of title, that covenant would not carry a right of recovery for the cost of improvements. Hence there could be no action for that particular loss founded on that covenant, and this court upheld an ac-

tion of *assumpsit* on the verbal agreement, holding that it was not merged in the subsequent deed. In the case of *Drinker v. Byers*, 2 Penr. & W. 528, there was a special warranty only, and as there could be no recovery upon that covenant, we upheld the prior agreement for indemnity, which was the equivalent of a general warranty.

In *Cox v. Henry*, 32 Pa. St. 18, Lewis, C. J., said, in delivering the opinion: "Two repugnant measures of damages cannot exist in the same action, between the same parties, relative to the same subject-matter: *Seitzinger v. Weaver*, 1 Rawle, 385. It follows, that where there is a covenant of warranty entered into at the time of the contract for the sale of land, and a similar covenant is embodied in the deed afterwards accepted, the first covenant is merged in the last, so far as regards the measure of damages: *Drinker v. Byers*, 2 Penr. & W. 528. But where, at the time of the contract of sale, a special covenant is entered into, with security, to indemnify the vendee 'against all costs, charges, and damages, on account of any and every lawsuit that may be brought against him to recover the land, by any and every claimant,' and this instrument is retained in the possession of the vendee after receiving the conveyance (in which there is no covenant relative to the same matter), the deed is not an extinguishment or a merger of the covenant for such indemnity." In this case there was a sufficient covenant of warranty in the deed to relieve against a failure of title, but not sufficient to justify a recovery for "all the costs, charges, and damages" caused by the suit which produced the eviction; and hence it was decided that an action might be maintained on the special agreement for indemnity on that account. That agreement was held not to be merged in the deed.

In *Anderson v. Washabaugh*, 43 Pa. St. 115, the deed for the premises was executed and delivered in March, 1854, and contained a clause of general warranty. Subsequently, in December, 1855, some doubts about the title having arisen, the grantor gave a bond of indemnity to the grantee to keep him "clear and indemnified" and "to make him secure and safe in the title" to the land. Afterwards there was an ejectment against the grantee, in which about five sixths of the land was recovered from him, and then an action on the bond, and a recovery, not only of the proportionate part of the value of the land, but also of counsel fees and costs

incurred in defending the title, and that judgment was sustained by this court. Strong, J., said: "The plaintiffs in error mistake in treating this case as if it were an action to recover damages for a breach of some one of the five ordinary 'covenants for title.' The extent of the liability of Anderson's estate is to be measured by the conditions of his bond. They imposed upon him greater obligations than he would have assumed had he merely covenanted for the quiet enjoyment of the land conveyed." In this case the agreement contained in the bond of indemnity was not made until nearly two years after the deed for the land was delivered, and the deed itself contained a covenant of general warranty. Notwithstanding this, a recovery was sustained on the bond, and included all counsel fees, costs, and charges incurred in defending the title.

\* It thus appears from the cases now cited that, whether the agreement for indemnity was made before or at the time of the sale, or afterwards, the right to recover indemnity in an action on the special agreement is sustained, and that whether the agreement was by writing or in spoken words is a matter of indifference. Such an agreement is not merged in the deed if made before or at the time of the deed, and is not destroyed by a covenant of general warranty in the deed if made thereafter. The same doctrine was applied in the case of *Robinson v. Bakewell*, 25 Pa. St. 424, in an action upon a similar bond, given one day after the deed, and although the deed contained a covenant of general warranty, and a recovery was had for all costs, charges, and expenses, including counsel fees, incurred in defending the title. We again enforced the same doctrine in the case of *Walker v. France*, 112 Pa. St. 203, where the warranty set up was entirely in parol, and preceded the execution of the written agreement for the sale of the land from which this part of the contract was omitted. We held the proof sufficiently clear to be submitted to the jury, and sustained a recovery for the breach of the verbal stipulation. Gordon, J., said: "That a written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion." It is not at all necessary to invoke

the support of this principle to sustain the present proceeding. There is no question here of altering the deed for the lots in question by inserting a clause left out of it by mistake, fraud, or accident. The case is only cited to show that where the parol stipulation is the inducing cause to the execution of the written instrument, the law is sufficiently flexible to give relief in this manner, if the evidence is of a perfectly clear and satisfactory character. But the case is of authority on the point that a contract in the nature of guaranty as to the quality of the land conveyed is not merged in the conveyance, and may be enforced independently of it.

In the present case, Zell, the grantor in the deed, was dead at the trial, and the plaintiffs could not testify. But the proof was very clear that the sale had been made to Close and Kershner upon the express condition that Zell would refund them the money if the title failed. Judge Bruckman testified as to what was said by Zell to Close in a conversation some time after the deed was delivered, as follows: "He said, in the presence of Mr. Close and myself, that if they [meaning Close and Kershner] should fail in holding on to this property at Thirteenth and Cotton, which they had bought from him, that he would refund to them the money that they had paid for it; that they should lose nothing. I think that Mr. Zell drew my attention to what he was saying; at least he looked at me when he said to Mr. Close that he should lose nothing. I was sitting by, and the conversation was more particularly carried on between Mr. Close and Mr. Zell." George E. Smith, to whom Zell had offered the property for eight hundred dollars, but was refused, said he saw a good deal of the parties, and knew about the negotiations going on between Zell and Close and Kershner for the sale of the property, both before and just after the sale. He was asked: "Q. Did you have any conversation with Mr. Zell afterwards? A. Yes, sir. Q. In which he said to you that he had entered into this agreement? A. Yes. After this sale was consummated,—after they had bought,—Mr. Zell said he had sold; he twitted me, and said I had missed a bargain in not buying, and I told him that I did not want to buy a lawsuit. He said there would be no trouble about that. He said he 'offered to give you back your money and make you whole in every respect; we gave it to these people in the same way; I promised the same, and I will do it.' He said: 'You see, what makes it necessary is, it is better for them to fight, if there is to be a



fight about it. It is better for me. They stand in a better light.' Mr. Bland said that to me, too. They were trying to sell it to me." He also said this conversation took place a few days after the sale, — probably not more than three. He was also asked: "Q. What else did he say besides what you have said? A. He said they had no risk to run; that they would make it whole; that he would stand everything. Q. Is that what he said, — that they had no risk to run, and that he would make it whole? A. Yes, sir; that they had it the same as he offered it to me. He said he would do it. Q. That they would have no risk to run, and he would make them whole? A. Yes, sir. Q. Is that all that he said? A. It was probably repeated two or three times, for all I know, in different words; I do not know that they were the exact words, but that was the way he said it. He said that what he had promised me he had promised them, and he would do so."

The other circumstances in the case were strongly corroborative of the foregoing testimony, and it was not contradicted. All of the testimony was carefully submitted to the jury by the learned court below, with instructions as to the character of the testimony required in such cases, that it should be clear, satisfactory, and manifest. The testimony was believed by the jury, who found a verdict for the plaintiffs. We do not see how they could have done otherwise. The assignments of error are all dismissed, as we find no error in any of them. The principles and authorities relied upon on behalf of the defendants are quite inapplicable to a case and a question of the character involved here.

Judgment affirmed.

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**VENDOR AND VENDEE — MERGER OF CONTRACT IN SUBSEQUENT DEED.—**

The general rule is, that all prior parol agreements with respect to a sale of land are merged in a subsequent warranty deed between the parties: *Clifton v. Jackson Iron Co.*, 74 Mich. 183; 16 Am. St. Rep. 621, and particularly note 622-624. But compare *Porter v. Noyes*, 2 Greenl. 23; 11 Am. Dec. 30, and note 34-39.

## PHILLIPS v. BURLINGTON LIBRARY COMPANY.

[241 PENNSYLVANIA STATE, 422.]

### FOREIGN CORPORATIONS — SERVICE ON PRESIDENT IN ANOTHER STATE. —

In the absence of statute, the president of a foreign corporation which only exists and does business in one state is not subject to the service of process while temporarily visiting another state, so as to bind the corporation in a transitory action against it arising in the state where it exists.

*Sylvester Gavitt, Jr., and Oliver E. Shannon*, for the appellants.

*Josiah R. Adams and Samuel B. Huey*, for the appellee.

PAXSON, C. J. The question here is one of jurisdiction. The defendant company is a foreign corporation, having its existence and place of business only in the state of New Jersey. It does not do business in the state of Pennsylvania, nor has it ever done so. The president of said corporation being temporarily within this state, for either business or pleasure, it does not matter which, was served with process issued against the company for a cause of action arising in the state of New Jersey. The defendant pleaded in abatement to the jurisdiction of the court, on the ground that the defendant is a foreign corporation, and exists only in the state of New Jersey, etc. To this plea the plaintiffs filed a demurrer, and on argument the court below gave judgment for the defendant.

The act of March 21, 1849, provides that in all actions in any court of record in Pennsylvania against a foreign corporation not holding its charter under the laws of Pennsylvania, "process may be served upon any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy thereof at the office, depot, or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes." It was contended by the plaintiffs that the service upon the defendant company was good under this act of assembly; and *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200, *Usher v. West Jersey R. R. Co.*, 126 Pa. St. 210, 12 Am. St. Rep. 863, and other cases, were cited in support of this proposition.

It may be that, if proper service had been made upon the company, the court would have had jurisdiction under the cases referred to. But the act of 1849 and the authorities cited contemplate a foreign corporation doing business within this commonwealth. It was said by our late brother Trunkay,

in *Knight v. West Jersey R. R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200: "The defendant in this case, if not incorporated under the laws of Pennsylvania, is doing business therein, else it could not have been made subject to the jurisdiction of the court of common pleas of Philadelphia." We do not understand that the act of 1849, or any of the cases cited, countenance the doctrine that if the president of a New Jersey corporation which transacts no business in this state crosses the Delaware River to dine with a friend on this side, he thereby carries the corporation with him, and subjects it to the jurisdiction of the courts of this state as to contracts made or torts committed in New Jersey. Under such circumstances he is not here in his representative capacity. He is not the corporation, nor does he bring it here. If the rule were otherwise he would carry the corporation with him upon a trip around the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it. The law upon this subject is well stated in *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15, as follows: "Upon general principles, and in the absence of statutory innovations, it is to be regarded as settled, in this state at least, that if a foreign corporation, at the time of the commencement of suit, does not do business and has not any office or place of business in this state, . . . such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any court of this state. Under such circumstances, the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions, and are not to be esteemed, out of the sovereignty by the laws of which the corporate body exists, the representatives for the purpose of responding to suits of law of such corporate body."

It is needless to multiply authorities upon so plain a question. The alleged injury of which the plaintiffs complain occurred in Burlington, New Jersey, the town in which the defendant company is located. There is no good reason why the courts of this state should be vexed with such a suit. Yet the action, being transitory, might have been sustained here, had the corporation been doing business here and a proper service made upon it. Under the circumstances, the judgment was properly entered for the defendant upon the demurrer.

Judgment affirmed.

**FOREIGN CORPORATIONS—PROCESS.**—Service of process upon an officer of a foreign corporation accidentally within the state is not a valid service: Note to *Hampson v. Weare*, 66 Am. Dec. 122. See also *Colorado I. Works v. Sierra G. Min. Co.*, 15 Col. 499; 22 Am. St. Rep. 433, and note. The rule for service of summons upon a foreign corporation is to serve the chief officer of the same if he can be found within the jurisdiction, or if not, then any managing agent: *Chicago etc. R. R. Co. v. Manning*, 23 Neb. 552. For the rule of service upon a foreign insurance company under the Indiana act of 1883, see *Rehm v. German Ins. etc. Inst.*, 125 Ind. 125.

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## RODENHAUSEN v. CRAVEN.

[141 PENNSYLVANIA STATE, 546.]

**NUISANCE.**—**STABLE AND CARPET-CLEANING ESTABLISHMENT** located in a neighborhood devoted to private residences, and rendering an adjoining house and home uncomfortable by the dust and moths from the carpets in process of cleaning, and from the stench arising from the stable, is a nuisance, and may be enjoined.

*George B. Carr*, for the appellants.

*William Gorman*, for the appellee.

**PER CURIAM.** The evidence fully justified the finding of the master that defendants' stable and carpet-cleaning establishment were nuisances. While such establishments are not necessarily nuisances, or nuisances *per se*, they may become so by reason of their location, and the manner in which the business is conducted. It is necessary to have carpets cleaned, and this involves a place where such work may be done; but care should be exercised to locate such establishments where they will cause the least annoyance to others. In this case the defendants selected a neighborhood devoted to private residences, and immediately adjoining the complainant's house. The natural result followed, and his home was rendered uncomfortable by the dust and moths from the carpets in the process of cleaning. This was not an imaginary grievance; it was a reality; a nuisance of a very serious character. Nor was the stable less so, by reason of its location. The appellants might have avoided this difficulty by selecting a different neighborhood for their operations.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

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**NUISANCES—WHAT ARE.**—The issuing of soot from a smoke-stack may be enjoined, where it constitutes a disagreeable nuisance in a large city: *Sullivan v. Royer*, 72 Cal. 248; 1 Am. St. Rep. 51, and note. Offensive odors

and smells of a loathsome trade are a nuisance, and may be abated, if detrimental to the comfort of those dwelling in the vicinity: *Ashbrook v. Commonwealth*, 1 Bush, 139; 89 Am. Dec. 616, and note; *People v. Detroit etc. Works*, 82 Mich. 471; *Fogg v. Nevada etc. Ry Co.*, 20 Nev. 429. A livery-stable in a town is not a nuisance *prima facie*, but becomes so, if used or kept so as to destroy the comfort of owners or occupants of adjoining premises: *Burditt v. Swenson*, 17 Tex. 439; 67 Am. Dec. 665, and note; *Gifford v. Hulett*, 62 Vt. 342. In *Susquehanna F. Co. v. Malone*, 73 Md. 268, the carrying on of a commercial fertiliser establishment, from which gases escaped, so noxious in character as to affect the health of the family of an adjoining land-owner, was decided to be a nuisance.

# CASES

IN THE

# SUPREME COURT

OF

# TEXAS.

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## TEXAS AND PACIFIC RAILWAY COMPANY v. MILLER.

[79 TEXAS, 78.]

**LIABILITY OF RAILWAY COMPANY FOR NEGLIGENCE WHILE IN HANDS OF RECEIVERS.** — A railway company is liable for personal injuries received through negligence of its employees while it is in the hands of a receiver under substantially the same state of facts as was shown in the case of *Texas Pac. R'y Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60.

**DUTY OF RAILWAY COMPANY TO USE GREATEST CARE IN PROVIDING FOR SAFETY OF PASSENGERS.** — It is the duty of a railway company to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually use in similar cases. This rule, imposing upon it the highest degree of care, applies, however, only to those means and measures of safety which the passenger must of necessity trust wholly to it, and is, in general, applicable only to the period during which it is in a certain sense the bailee of the person of the passenger. But this degree of care is required of all passenger carriers in reference to the movement of a train at a station, as well as on the road; for over such movement the passenger has no more control in the one case than in the other, and must trust wholly to the carrier, as he does when sitting in the car as to the rate of speed or any other matter affecting his safety. The transit of a passenger cannot be considered as ended until he has left the car.

**CONTRIBUTORY NEGLIGENCE OF PASSENGER DEFEATS HIS RIGHT TO RECOVER** against a carrier, even in a case in which the latter has not used the proper degree of care.

**REFUSAL TO GIVE CHARGE NOT GROUND FOR REVERSAL WHEN.** — The refusal to give a charge to the effect that there is no evidence in the case tending to show a given state of facts is not a ground for reversal, no notice having been taken of such matter in the general charge of the court.

**WHETHER RAILWAY PASSENGER MUST BE ASSISTED IN ALIGHTING FROM CAR QUESTION FOR JURY WHEN.** — The question whether or not the failure of the employees of a railway company to assist a female passen-

ger laden with bundles in alighting from a car is a want of that measure of care which the company owes to her as a passenger, is one to be determined by the jury upon a consideration of all the circumstances in the particular case.

**SPECIAL ISSUES—SUBMISSION OF, IN DISCRETION OF COURT.**—It rests in the discretion of the court whether a general verdict shall be taken, or one in answer to special issues; and to justify a reversal of a judgment on the ground that the court refused to submit special issues, it must be shown that this discretion has been clearly abused.

**SPECIAL ISSUES INSUFFICIENT TO AUTHORIZE JUDGMENT**, when properly answered, ought not to be submitted to the jury.

**RIGHT TO DISMISS AS TO ONE PARTY TO ACTION.**—Where a plaintiff sues both a railway company and the conductor of one of its trains, he may dismiss as to the conductor at any time before the jury retires, where the facts do not show that he was made a party for the purpose of weakening the effect of his evidence if offered as a witness for the defendant. And the fact that defendant's counsel did not know of the dismissal until some time after the trial is immaterial.

**ACTION to recover damages for personal injuries.** The opinion states the case.

*H. D. Prendergast*, for the appellant.

*James Turner*, for the appellee.

**STAYTON, C. J.** Plaintiff sues to recover damages for injury done to his wife, alleged to have been caused by the negligence of servants of receivers then in charge of appellant's railway, whereby she was injured in alighting from a train.

A judgment for two thousand five hundred dollars was rendered for the plaintiff, and there is no claim that this is excessive; but it is urged that the court should have granted a new trial on the ground that the weight of the evidence showed that the train remained at the station where plaintiff's wife was to leave it a sufficient length of time for her to have alighted with safety; and further, because no negligence on the part of the persons operating the train was shown.

The evidence was conflicting as to the time the train stopped at the place plaintiff's wife was to leave it, but all tends to show that she was injured by a fall caused by the starting of the train while she was alighting, and that in this she had no assistance from any servant of the receivers.

Her own statement shows that she had several bundles, and started to leave the train as soon after it stopped as she could while thus encumbered, and that while she was alighting the train started suddenly and threw her down, inflicting thereby serious injury.

So standing the evidence, we are not authorized to reverse the judgment on account of the ruling of the trial judge on the motion for new trial. Substantially the same facts, to fix liability on appellant for an injury inflicted while its road was in the hands of receivers, are shown as was in the case of *Texas Pac. R'y Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60, and in several other cases, and the same defenses were urged against liability and against the right of plaintiff to maintain this action or any other, save in the court that appointed the receivers, whom it had long before discharged, and all property in their hands returned to appellant.

The assignments of error relating to the rulings on these defenses have been fully considered in cases heretofore decided, and need not be further discussed.

The court instructed the jury as follows: "If you believe from the evidence that on the arrival of the train on which Mrs. Miller was a passenger at Woodlawn, that she used reasonable diligence, circumstanced and conditioned as she was, to get off said train, and that the train did not stop a sufficient length of time to enable her to alight from the same in safety, and that while she was endeavoring to get off, the train started with a jerk and caused her to fall, and in said fall she was, without failure on her part to use ordinary or reasonable care for her own safety, injured, then you will find for the plaintiff. You are further instructed that if the train did not stop long enough at Woodlawn to enable Mrs. Miller, in her condition and circumstances, to get off in safety, and when she was trying to get off the train the train started, and while it was moving she undertook to get off and was injured, and in so trying to get off a moving train was herself guilty of a want of ordinary care, as defined to you hereinafter, then you will find for the defendant."

These charges having been given in connection with one which was as follows: "If the train stopped long enough for Mrs. Miller to have gotten off safely, circumstanced and conditioned as she was, and she failed to use reasonable diligence to get off, and unnecessarily and negligently remained upon the train till it started, and then undertook to get off and was thrown down and hurt, then the plaintiff cannot recover," it is urged that it was error to give this last charge, "because it made it necessary to show both the negligence of plaintiff's wife and defendant's care to entitle defendant to a verdict." We do not think the charge susceptible of such a construction.



The jury would rather have understood from that charge, considered alone, that plaintiff would not be entitled to recover if his wife did not use reasonable diligence to leave the train, if it stopped a sufficient length of time to have enabled her to do so safely, without reference to any other fact than that the train was in motion when she attempted to leave it; and looking to all the charges quoted, there is not the least reason to believe that the jury were misled in any respect hurtful to appellant.

The court, after instructing the jury that it was the duty of persons operating a railway train to stop at stations long enough for passengers to alight in safety, and that it was the duty of passengers to use that time with reasonable diligence, instructed that "it is the duty of a railway company to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually use in similar cases," which, it is claimed, was erroneous, "because such a duty does not rest on a passenger carrier with reference to the length of time they stop at stations for the passengers to alight, nor as to the condition of the platform."

In support of this proposition, counsel quotes from the case of *Railway v. Marion*, 27 Am. & Eng. R'y Cas. 132, the following: "It is only in respect to these accidents which happen to the passenger while he trusts himself to the safety of the carrier's means of transportation, or to the skill, diligence, and care of his servants, that the rule applies. . . . It does not apply where the occasion of the hurt of the passenger was an active, voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation or accommodations; and the reason is, that in such a case it is necessary to consider whether there may not have been contributory negligence on the part of the passenger."

This language was used in discussing the sufficiency of facts stated to raise a presumption of negligence in a case in which a passenger who attempted to alight from a moving train was basing his right to recover on the ground that a railway platform was defective.

It is said by an elementary writer that "the rule imposing upon the carrier of passengers the highest degree of care has this limitation: it applies only to those means and measures of safety which the passenger of necessity must trust wholly to the carrier. It is, in general, applicable only to the period

during which the carrier is in a certain sense the bailee of the person of the passenger": Thompson on Carriers of Passengers, 209.

The rule thus stated seems reasonable, and under it we believe the charge of the court was correct, in view of the facts of the case.

The injury occurred on account of the movement of the train before Mrs. Miller alighted, and we are of opinion that in reference to the movement of a train at a station, as well as on the journey, the degree of care declared by the charge is required of all passenger carriers; for over such movement the passenger has no more control in the one case than in the other, and must trust wholly to the carrier, as does he when sitting in a car as to the rate of speed or any other matter affecting his safety. The transit cannot be considered ended until the passenger has left the car; but while this is so, the liability of the carrier, even in a case in which he has not used the proper degree of care, may be defeated by the contributory negligence of the passenger.

While the petition in this case alleged that the "platform at Woodlawn was not safe and long enough for the purpose for which it was built, . . . and that there was no platform by the step where his said wife got off said train," there was no evidence showing that the platform was in any respect defective, but there was evidence from which it might be inferred that the steps of the car were just beyond its end.

The charge of the court made no reference to a possible liability on account of any defect in the platform, but appellant asked a charge to the effect that there was no evidence of any defect in the platform, and that no verdict could be found in favor of plaintiff on account of its condition. The refusal to give this charge is assigned as error.

It has been frequently ruled that the giving of a charge upon a state of facts there was no evidence tending to show the existence of, was erroneous, because misleading; but it has never been held that the refusal to give a charge to the effect that there was no evidence tending to show a given state of facts was ground for reversal.

The court refused to give the following instruction: "The jury are charged that there was no duty resting on the defendant's servants in charge of said train to assist Mrs. Miller from the train, unless she shows that from disability or infirmity on her part she was unable to get off readily without

assistance. She must show also that the employees in charge of the train knew of such disability or infirmity before plaintiff can recover on account of any negligence of the defendant in not having some person there to assist Mrs. Miller off."

The court had instructed the jury as follows: "Whether or not the failure to assist Mrs. Miller in getting off the train on the part of the persons in charge of said train was a want of that measure of care which the employees of said receivers owed to her as a passenger, you will determine from all the circumstances, taking into consideration the failure on her part to ask for such assistance."

The evidence showed that Mrs. Miller attempted to alight from the car at the proper place, and that some of the employees assisted or attempted to assist her.

The conductor stated that it was the duty of the brakeman to assist passengers to enter and leave the train, and that this was also the duty of the porter as to persons who were at the proper place, or when requested. The testimony of the porter was to the same effect.

There are cases that seem to hold as matter of law that no duty rests upon carriers of passengers by rail to assist persons entering or getting off their cars: *Raben v. Railway*, 31 Am. & Eng. R'y Cas. 49; *Raben v. Railway*, 33 Am. & Eng. R'y Cas. 520; *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 614; 97 Am. Dec. 478.

A contrary ruling seems to have been made in *Jeffersonville etc. R. R. Co. v. Hendricks*, 41 Ind. 69, and in *Jeffersonville etc. R. R. Co. v. Hendricks*, 26 Ind. 232.

*Missouri Pac. R'y Co. v. Wortham*, 78 Tex. 27, was a case in which a female passenger was injured while alighting from a car, on account of an unsafe foot-rest between the lower step of the car and the ground; and while declining to say that it was the duty of employees of the carrier to give assistance to persons entering or leaving a train if proper means for doing this with safety were furnished, it was said that the carrier "owed her the duty of providing not only a reasonably safe appliance for enabling her to alight in order to make the transfer, but the safest that had been known and tested."

As already said, the degree of care necessary to be exercised by the carrier was correctly stated in the charge of the court, in view of the facts of the case; and whether, to constitute this degree of care, it was necessary that employees of the carrier should have assisted Mrs. Miller to alight from the train, was

properly and correctly submitted to the jury in the charge given.

To have given the charge requested by appellant would have been erroneous, and an assumption on the part of the court to decide a mixed question of law and fact.

Appellant requested the court to submit to the jury two special issues, which only required answers to the questions, How long did the train stop at Woodlawn? What would have been a reasonable time for Mrs. Miller to get off the car after the train stopped?

The court refused to submit them.

The statute provides that "the jury shall render a general or special verdict, as may be directed by the court, and the verdict shall comprehend the whole issue, or all the issues submitted to them": R. S., art. 1333.

It rests in the discretion of the court whether a general verdict shall be taken, or one in answer to special issues; and if this be a matter that this court would revise, it would require a showing that this discretion had been clearly abused, to justify a reversal of a judgment on the ground that the court had refused to submit special issues.

If special issues are submitted, they should be such that, upon proper answers to them, the court could properly render a judgment. If the two issues presented by the charges asked had been submitted and answered most favorably to appellant under the issues of fact in the case, no judgment could properly have been rendered; and if answered adversely to appellant, would have been insufficient to have authorized any judgment for appellee.

The conductor in charge of the train when Mrs. Miller was injured was made a defendant, and testified in behalf of appellant and himself, and Mrs. Miller was a witness in behalf of plaintiff.

During the argument before the jury, counsel for appellant was insisting that Mrs. Miller was an interested witness, and therefore not entitled to such credit as she would otherwise be, and that witnesses for appellant were disinterested, and therefore entitled to credence, when counsel assisting leading counsel for the plaintiff remarked that the conductor was an interested witness, being a defendant against whom a judgment was sought.

After the close of the argument, without the knowledge of counsel for appellant, the case was discontinued as to the con-

ductor by leading counsel for the plaintiff, and this fact seems not to have come to the knowledge of appellant's counsel until many days after the trial, when an amended motion for new trial was made, on account of the facts herein stated.

It is urged that the court should have granted it.

It was the right of plaintiff to make the conductor a party, and to dismiss as to him at any time before the jury retired. The facts do not show that he was made a defendant for the purpose of weakening the effect of his evidence should he be offered as a witness for the defendant.

If counsel had been informed of the dismissal of the case as to him, this could not in any manner have affected the question of his credibility in so far as that might be affected by his interest in the action; for his testimony would be considered in the light of his relation to the case at the time he testified, and not as it subsequently was.

No error is found in the proceedings that led to the judgment, and it will be affirmed.

**RECEIVER OF RAILWAY — LIABILITY FOR NEGLIGENCE.** — A receiver having control of a railway is liable for injuries received by an engineer who, without fault on his part, is injured through the negligence of the receiver in using defective appliances on the road: *Texas P. R'y Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60, and extended note. Suit for personal injuries by an employee may be brought against a receiver managing a railroad: *Brown v. Gay*, 76 Tex. 444.

**RAILROAD COMPANIES — DUTY TO USE GREATEST CARE IN PROVIDING FOR SAFETY OF PASSENGERS.** — In explaining the cause of an accident, the company must show that it was one that could not have been avoided by the use of the utmost care and prudence: *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519; 20 Am. St. Rep. 483, and extended note. Carriers bind themselves to carry passengers safely, to the utmost care and diligence of very cautious persons: *Richmond etc. R'y Co. v. Scott*, 86 Va. 902; *Nagle v. California etc. R. R. Co.*, 88 Cal. 86; *St. Louis etc. R. R. Co. v. Finley*, 79 Tex. 85.

**RAILROAD COMPANIES — CONTRIBUTORY NEGLIGENCE OF PASSENGER — BARRING RIGHT TO RECOVER.** — A passenger standing up in the caboose of a freight train, when seats are provided for all passengers, is guilty of contributory negligence: *Wallace v. Western etc. R. R. Co.*, 98 N. C. 494; 2 Am. St. Rep. 346, and note. Where a passenger's acts are the proximate cause of his injury, he cannot recover: *Richmond etc. R. R. Co. v. Picklesimer*, 85 Va. 798; *Herman v. Chicago etc. R'y Co.*, 79 Iowa, 161; *Reed v. Axtell*, 84 Va. 231; *Gebhard v. Detroit etc. R'y Co.*, 79 Mich. 586; *Richmond etc. R. R. Co. v. Yeomans*, 86 Va. 860.

**RAILROAD COMPANIES.** — A conductor's duty does not require him to assist a female passenger to alight from the car, with her two small children, when she reaches her destination: *Raben v. Central etc. R'y Co.*, 73 Iowa, 579; 5 Am. St. Rep. 708, and note.

## TAYLOR, BASTROP, AND HOUSTON RAILWAY COMPANY v. TAYLOR.

(79 TEXAS, 104.)

**GENERAL DEMURRER WILL NOT REACH DEFECTIVE CLAIM FOR EXEMPLARY DAMAGES WHEN.** — In an action to recover actual and exemplary damages, if the petition is sufficient for the recovery of actual damages, a defect therein in stating a claim for exemplary damages cannot be reached by a general demurrer.

**CONDITION OF RAILWAY TRACK, EVIDENCE OF, WHEN ADMISSIBLE.** — In an action to recover for injuries received in a railway wreck, evidence tending to show the condition of the track and road-bed immediately before and at the time of the wreck, at places other than where the wreck occurred, is admissible.

**NEGLECT — INSTRUCTION AS TO, WHEN SUFFICIENT.** — It is sufficient for the court to state, in its charge to the jury, the law of negligence as applied to the facts of the case, without giving any abstract definitions of negligence, gross negligence, or contributory negligence.

**RISKS NOT ASSUMED BY EMPLOYEE OF RAILWAY COMPANY.** — A railway employee traveling to his work over a part of the company's road, where he owes no duty of inspection, does not assume risks from defects in the road-bed, track, or bridges which render his employment more hazardous than is reasonable. It is the duty of the company to keep its road in a reasonably safe condition, and every employee has the right to assume that a part of the road which he is not required to inspect or repair is in such condition.

**EMPLOYEE ONLY BOUND TO EXERCISE CARE IN LINE OF HIS DUTY.** — An employee who knew of the defect that caused injury to him must be held to have assumed the risk occasioned thereby; but he is not bound to exercise care in knowing the fact, unless it is in the line of his duty.

**RAILWAY COMPANY PERMITTING ITS ROAD TO BE DEFECTIVE CHARGEABLE WITH NEGLIGENCE.** — A railway company that permits its road-bed, track, or bridges to become so defective and out of repair as to render the operation of its trains over the same more dangerous to its employees than is reasonable and proper, is guilty of negligence. And a court may, without saying anything about negligence, instruct the jury that if a railway company permits its road-bed and track to become unreasonably dangerous to its employees, a recovery may be had against it.

**ERROR IN CHARGE TO JURY, WHEN HARMLESS.** — Where a verdict finds actual damages only, an error in the charge to the jury concerning exemplary damages is harmless.

**CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES.** — In an action brought by a wife against a railway company to recover damages for the death of her husband, a charge to the jury that if the deceased was guilty of contributory negligence the plaintiff could not recover, and that in riding on the train of the defendant it was the duty of the deceased to conduct himself as a man of ordinary prudence and care would have done under the circumstances in which he was, and if he failed to use such ordinary care, and by so doing brought about or contributed to his own death, he would be guilty of contributory negligence, correctly states the law.

**UNNECESSARY CHARGE, REFUSAL TO GIVE, NOT ERROR.** — Where a statute provides that a person suing for the death of another cannot recover unless the deceased, if living, could recover, it is not necessary to charge the jury to that effect, and it is not error to refuse to do so.

**BURDEN OF PROOF NOT UPON PLAINTIFF WHEN.** — Where, in an action for negligence, there is no defect in the plaintiff's proof, and the issues upon the facts are clearly submitted to the jury, it would be improper to charge the jury that the burden of proof is upon the plaintiff to establish negligence on the part of the defendant.

**REFUSAL TO GIVE CHARGE MERELY REITERATING PRINCIPLE OF ONE ALREADY GIVEN NOT ERROR.** — A court may properly refuse to give a charge which merely reiterates the principle of the general charge already given.

**ACTION to recover for injuries resulting in death.** The opinion states the case.

*S. R. Fisher*, for the appellant.

*Cochran and Parker*, for the appellee.

**COLLARD, J.** This suit was brought by Mrs. M. V. Taylor against the appellant railway company for actual and exemplary damages because of injuries to her husband, resulting in his death, while riding on defendant's work-train, he being at the time an employee of defendant as a section-foreman. He was section-foreman of section No. 2. He received his injuries on section No. 5, which was in charge of Section-foreman Pierce.

On the morning of the 28th of March, 1888, defendant started its work-train from Taylor south towards Bastrop, picking up the bosses of the various sections and their hands, intending to take them to a gravel-pit between Sayers and Bastrop, there to load the cars with gravel for use of the road. The train was composed of an engine, tender, twelve flat-cars, and a caboose. By the time the train had reached Cedar Hollow, on section No. 5, where the accident occurred, some twenty or twenty-five men had been taken aboard the train. There was evidence showing that the caboose was crowded, and some of the men rode on the flat-cars, of which there were twelve in the train. It was more dangerous to ride on the flat-cars than in the caboose. It was customary for the men to ride on the flat-cars whenever they pleased, and the custom was known to the company. There was no order prohibiting such practice. Taylor rode awhile in the caboose, then moved onto the flat-car near the caboose, and then to the third car from the engine. The track was in bad condi-

tion in many places. There were several defective places near the north end of a bridge across Cedar Hollow. Right at the bridge there was a rise on the north side, so that the engine and cars south had to mount the rise to get on a level with the bridge. North of this there were uneven places in the track, caused by the rails and ties sinking down into the road-bed as the engine and cars passed over. Thirty feet north of the bridge was the first sunken rail, at the first joint north of the bridge. It was the practice of old engineers, who were familiar with the road and acquainted with the bad places, to reduce the speed of the train to about nine miles an hour in passing over these uneven places. It was dangerous to run over them at a speed of twelve or fifteen miles per hour. When the trains were slowed up to a speed of not more than nine miles an hour, there was no danger at the bridge. There was no danger when an old engineer had charge of the engine, and used such caution; the danger was when a new engineer might be running over it.

This place had been in bad order about a month before the wreck. The road-master had had his attention called to it by Engineer Garrett, who slowed up his train in passing over it, and the road-master said he would order it repaired, and he did order Pierce, the section-foreman, to repair it. Pierce did repair a place sixty feet from the end of the bridge, supposing that was the place to be fixed, but he said it was level nearer the bridge, and needed no repairs. The place he did fix he said he did not fix perfectly. A top-heavy engine running over the place would roll and careen to one side. The work-train with the hands aboard, as before stated, was running over this part of the road, a new engineer to this part of the road in charge of the engine, and a few feet before reaching the north end of the bridge the engine or tender ran off of the track on the right side, not far from where the sink was; the caps of the bridge were struck and the bridge went down, drawing several flat-cars into the chasm. The train at the time was running twelve or fifteen miles an hour,—not more than schedule time. Taylor was seriously hurt in the wreck, and a few days thereafter died of his injuries. Some of the witnesses say the cause of the wreck was a loose joint in the track north of the bridge, that would sink when the engine was on it and spring back level when the weight passed over it. It had in this way sunk the road-bed at the point and rendered it dangerous. It was in proof by one



witness that the sunken place ran up close to the bridge, within twelve or fifteen feet.

One of the defendant's engineers, yet in the employ of the defendant, testified concerning the low joint north of the bridge, on the right-hand side going south, and said he had called the attention of Johnson, the road-master, to it twice, and at one time slowed over it and told him to watch it; that he had called Pierce's attention to it three days before the wreck. Johnson promised to have it fixed, and did throw off a note to Pierce, ordering him to fix it. He says: "Before I was told where the wreck occurred I told my conductor that I knew the spot where it had occurred. I knew the place because of my knowledge of its defective condition there."

It was in proof that Taylor had been on the train and had passed over that part of the track the day before, and possibly oftener, but it was not on his section. Many others who had passed over the place said that they had not noticed any defect in the track at the point, — and several who had been over it frequently. The conductor in charge of the train had been over it three or four times, but had not noticed anything wrong there. There was much evidence tending to show that the road was in passable condition, — that is, in ordinary repair.

Albrough, another section-foreman, who, with his men, was taken on the work-train that morning, testified that he saw Taylor on the train. He says: "When I first got on the train I took my place in the caboose, and remained in there for an hour or so, but I got out onto a flat-car at Coupland and stayed out until the wreck. I was on the third car from the engine. Taylor was on the car with me, as was another man I did not know. Taylor was on the second car from the caboose when I met him, and he went to the third from the engine, on which I was riding. He had been with me on that car about twenty minutes, and was on that car at the time of the accident. . . . At the time of the wreck, I first saw the tender jump the track, and by that time Taylor got ready to jump, and he jumped, and struck the cap of the bridge, and that was the last I saw of him. I slid across the bridge on the flat without any trucks under it until it got over the bridge, and I do not know whether I jumped or walked off. The flat I was on scooted over the opening. I told Taylor not to jump. I told him, because the first two cars were in the direction he was going to jump, and I was

afraid he would be caught in the wreck of the cars. I was not hurt. The caboose did not go off the track. . . . The day before, when I rode over it, it seemed to be in fair condition, but there might have been a swing in it; I could not tell. . . . In my judgment, that track, for a new road-bed, along there for about twelve miles, was in good condition. All new road-beds sink more or less. All new road-beds do not stay sunk; they are supposed to be kept up. When a place gets out of order, a man can fix it up in a day, but how long it will stay is another thing."

Perrin, the engineer in charge of the engine at the time of the accident, testified, when first on the stand, that the speed of the train at the time and place of the wreck "was about twelve miles an hour; it might have been a mile or two faster or a mile slower; that is about the speed." He said he "was on track that he was allowed to make fifteen miles an hour on."

He was afterwards recalled, and testified that he could not state the speed of the train as he passed over the place on the day before the accident, but says: "I was going about as fast as I thought it was safe. I guess it may have been twenty or twenty-five miles an hour at the point between the gravel-pit and Elgin."

Avery testified that he took a load of gravel over the place the day before the wreck, going twenty-five or thirty miles an hour, but then he was going north, with engine and pilot in front.

Other particulars of the case will be stated hereafter, if required.

The jury gave verdict for plaintiff for five thousand dollars actual damages. Judgment was rendered accordingly, and defendant appealed.

The first assignment of error is, that the court erred in overruling defendant's general demurrer to plaintiff's original petition, and, in particular, to such parts thereof as claimed exemplary damages.

There is no question but that the petition was sufficient in law for a recovery of actual damages, and had it been defective in the claim for exemplary damages, the defect could not be reached by a general demurrer.

The next assignment is, that the court erred in permitting plaintiff to introduce evidence tending to show the condition of the track and road-bed immediately before and at the time of the wreck, at places other than where the wreck occurred.

This question has been decided adversely to appellant in *Texas etc. R'y Co. v. De Milley*, 60 Tex. 194. The point is elaborated in that case, and needs no further discussion.

The next assignment of error presented in appellant's brief is, that the court erred in its charge to the jury, in failing to define the terms "negligence," "gross negligence," and "contributory negligence."

The court did not attempt to give any abstract definitions of these terms, but stated the law of negligence in the charge as applied to the facts of the case, which was all that was required.

The appellant further objects to the charge of the court as follows: "The court erred, in paragraph 7 of its charge to the jury, in instructing the jury 'that the deceased, Taylor, in accepting employment with the defendant company, assumed the risks incidental to travel over the road while it was in a reasonably safe condition, and that he did not assume risks which grew out of any defect in the road which rendered it more hazardous than reasonable, unless Taylor had knowledge of the defects occasioning the extra hazard,'—1. Because said instruction does not correctly state the risks assumed by an employee in railroad service; 2. Because it is a charge upon the weight of evidence, in assuming the existence of defects in the roads; and 3. Because it made the defendant company's liability for injuries resulting from defects in track, road-bed, etc., depend solely upon the absence of knowledge of such defects on Taylor's part, without reference to the further inquiry whether, by the exercise of reasonable care and prudence, Taylor might not have discovered defects exposing him to danger."

The court instructed the jury upon this subject as follows:—

"6. It is the duty of the defendant to keep its road-bed, track, and bridges in such condition as to be reasonably safe to its employees in operating its trains over same at a reasonable and proper rate of speed.

"7. In accepting employment from the defendant, the said W. S. Taylor accepted the risks incident to travel over the road while it was in the condition above indicated, and he did not accept risks which grew out of any defects in the road which rendered it more hazardous than reasonable, unless he had knowledge of the defects occasioning the extra hazard.

"8. If the defendant permitted its road-bed, track, and bridges, or either of them, to become so defective and out of

repair as to render the operation of its trains over the same more dangerous to its employees than it was reasonable and proper for it to be, this would be negligence on the part of defendant."

The seventh paragraph of the charge only states facts upon which deceased would and would not be held to assume risks, and did not assume that defects existed, nor was it a charge upon the weight of evidence. Paragraph 8 of the charge, immediately after the section complained of, properly submits the question of defective condition of the road to the jury. The jury were also told, in the fourteenth clause of the charge, that if the wreck was not caused by defects in the road-bed, track, or bridge, they should find for defendant: *Texas etc. R'y Co. v. Hardin*, 62 Tex. 373.

Deceased did not assume risks from defects in the road-bed or track which rendered his employment more hazardous than was reasonable. It was the duty of the company to keep its road in a reasonably safe condition, and deceased had the right to assume that a part of the road which he was not required to inspect or repair was in such condition. The charge, in this respect, was the law of the case: *International etc. R'y Co. v. Bell*, 75 Tex. 50.

If deceased knew of the defect that caused the injury, he would, as an employee of defendant, be held to have assumed the risk occasioned thereby, but he was not bound to use care in ascertaining the fact on that part of the road where the accident occurred. It did not occur on the section of the road of which he was foreman, where it was his duty to inspect and repair the road, but on another part. He was being carried by defendant's train on other employment, in no wise connected with his duties as section-foreman over the road where he owed no duty as inspector. The rule is, that if the employee knows of defects which cause injury to him, he assumes the risk, but he is not bound to exercise care in knowing the fact, unless it is in the line of his duty. The principle contended for by appellant does not apply to a case like this: *Hannibal etc. R'y Co. v. McNamara*, 59 Tex. 255.

Appellant's next assignment of error is: "The court erred, in paragraph 8 of its charge to the jury, in charging, in effect, that if the defendant permitted its road-bed, track, and bridges, or either of them, to become so defective and out of repair as to render the operation of its trains over the same more dangerous to its employees than was reasonable and

proper, this would be negligence on the part of defendant, because whether the facts enumerated constituted negligence or not was a question of fact for the jury to determine."

A similar charge to the above was held to be a correct exposition of the law: *Gulf etc. R'y Co. v. Silliphant*, 70 Tex. 630, 631.

The foregoing charge does not tell the jury that any certain act, or the omission of any certain act, would constitute negligence. It correctly states the elements of negligence as applied to the facts of the case, which elements, if found by the jury, would be a finding of negligence.

The question of negligence *vel non* must, as a general rule, be left to the jury; but the court is not compelled to use any particular set phrases to communicate to the jury what is meant by it. If the law of negligence in a given case is correctly stated, it is sufficient. The law was correctly declared in the charge complained of. Had the court instructed the jury that if the defendant had permitted its road-bed and track to become unreasonably dangerous to its employees, etc., plaintiff should recover, without saying anything about negligence, it would have been correct: *International etc. R'y Co. v. Bell*, 75 Tex. 50.

The next assignment of error complains of supposed error in the court's charge concerning exemplary damages. The jury found for the defendant upon the issue. If there was error in the charge, it was harmless.

It is urged that "the court erred, in paragraph 10 of its charge to the jury, in instructing the jury, in effect, 'that in riding on trains of the defendant, it was the duty of the deceased to conduct himself as a man of ordinary prudence and care would have done under the circumstances in which he was; and if he failed to use such ordinary care, and by so doing brought about or contributed to his own death, he would be guilty of contributory negligence,' because the instruction is an incorrect statement of the law."

We find nothing erroneous in this charge. It is the law. The court supplemented the charge by telling the jury that if the deceased was guilty of contributory negligence, plaintiff could not recover. Such instructions were eminently proper under the issue of contributory negligence.

The next assignment supposes error in the court's charge upon exemplary damages, and refusal to give charges asked upon the subject, which, for reasons before stated, need not be considered.

The next assignment of error is, that the court erred in refusing special instructions 1 and 2 asked by defendant, to the effect that plaintiff could not recover unless the deceased, if living, could recover.

This is a statutory provision, but it is unnecessary to give it in charge to the jury. All that is necessary is to charge the law of the case. The requested instruction No. 1 simply announced the rule that plaintiff could not recover if deceased could not, if living, and suing for himself; the second was a reiteration of the first, and contained some other additional matters, among which was the following: That in order to a recovery by the plaintiff, she must show "that Taylor did not know, and had not equal means of knowing, the danger to which he was exposed in going over the track on the train." We have already seen that this charge should not have been given, as deceased was under no obligations to the company to know the condition of the track where the wreck occurred, and hence, although some part of the charge might have been correct, it could not be given because of the error in the clause of the requested charge quoted.

Defendant requested special charges instructing the jury that the burden of proof was on the plaintiff to establish negligence on the part of defendant, and that until this fact is established, the law presumes that the defendant exercised proper care for Taylor's safety. There was no defect in the proof of plaintiff, and nothing in the case calling for a charge upon the burden of proof. The issues upon the facts were clearly submitted to the jury, and it would have been improper to charge that the burden of proof was upon the plaintiff to establish negligence; nor was it necessary to instruct the jury that it would be presumed that defendant had exercised proper care until the contrary appeared.

Defendant also asked the court to instruct the jury that the law only imposes upon the defendant the duty to exercise reasonable and ordinary care to provide safe road-bed, track, and bridges for an employee in its service, and that if it had done so, plaintiff could not recover.

The court, in the general charge, had instructed the jury that it was the duty of defendant to keep its road-bed, track, and bridges in such condition as to be reasonably safe to its employees in operating its trains over the same at a reasonable and proper rate of speed, and that deceased did not

assume risks which grew out of defects in the road which rendered it more hazardous than reasonable, unless he had knowledge of the defects occasioning the extra hazard. This charge given informed the jury as to the care required of the company; that it was to keep its road, track, etc., in reasonably safe condition. These expressions are equivalent to a direction that the company was only bound to use ordinary care. The charge asked does not define ordinary care, and does not call the attention of the court to the necessity of such a definition. It did not cure any defect that may have been in the court's charge in this respect.

Another assignment of error is, "The court erred in refusing to give in charge to the jury special instructions Nos. 9 and 10 asked by defendant, because the mere absence of a rule or regulation prohibiting employees of a railroad company from doing acts or indulging in practices which are not necessary or required to be done in the prosecution of their employment, and which may be dangerous to their safety, will not relieve an employee from the consequences of his own act, where injury results therefrom, nor impose upon the company a liability which otherwise it would not rest under."

Defendant requested the following to be given in charge to the jury:—

"No. 9. You are instructed that the mere absence of a rule or regulation prohibiting employees of a railroad company from doing acts or indulging in practices which are not necessary or required to be done in the prosecution of their employment, and which may be dangerous to their safety, will not relieve an employee from the consequences of his own acts, where injury results therefrom, nor impose upon the company a liability which otherwise it would not rest under. If, therefore, you believe from the evidence that riding upon a flat-car in a work-train when a caboose is provided was not prohibited by a rule, regulation, or order of the defendant at the time of the alleged injuries to Taylor; that at said time Taylor was riding upon a flat-car in a train provided with a caboose; that so riding was dangerous; and that Taylor would not have sustained the alleged injuries on the occasion referred to had he ridden in the caboose instead of on the flat,—you will find for the defendant, if you further believe from the evidence that he voluntarily placed himself on the flat, with ample room for his safe accommodation in the caboose.

"No. 10. If from the evidence you believe that the train upon which Taylor was riding at the time he received his alleged hurts was provided with a caboose for the transportation of hands, and that it was sufficiently commodious safely to accommodate Taylor and other hands proceeding along the track in the train; and you further believe from the evidence that Taylor voluntarily placed himself upon one of the flat-cars composing the train, and that his situation on the flat was more dangerous than it would have been in the caboose; and you further believe that he would not have been hurt or have sustained the injuries it is alleged he received had he remained in the caboose, — you will find for the defendant. In this connection, if you find riding on a flat-car in a work-train is dangerous, or attended with more danger or risk than riding in the caboose, and that Taylor knew, or might have known by the exercise of reasonable care and diligence, the danger, then you are instructed that whether or not a printed or written rule prohibiting the riding on flats where a caboose is furnished was promulgated by the defendant is immaterial; for in the absence of affirmative proof that the managing officers or agents of the defendant knew of the habit or practice, if such existed, of hands on work-trains riding on flats or in the caboose, at their election, the non-existence of a rule prohibiting the practice cannot be considered as sanctioning it."

It was in evidence — indeed it was the undisputed evidence — that it was the custom of the employees engaged in such service as they were then ordered to do to ride where they pleased, in the caboose or on the flat-cars; that they did so habitually, with the knowledge of the defendant, who so carried them without objection. There was no order prohibiting the practice.

If any charge was needed upon this subject, the demand was fully and sufficiently met by the court's general charge upon contributory negligence of deceased.

We find no error in the rulings of the court below or in the judgment that requires a reversal, and our conclusion is, that the judgment ought to be affirmed.

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**RAILROAD COMPANIES — LIABILITY FOR DEFECTS IN ROAD-BED.** — A railroad company is liable for defects in its road-bed, due to the negligence of the leasing construction company: *Chattanooga etc. R. R. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169, and note. A railroad company is liable to an employee injured through defects in its road-bed: *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311, and note; *Southern etc. R. R. Co. v.*



*Aylward*, 79 Tex. 675; *Trinity etc. R. R. Co. v. Lane*, 79 Tex. 643; *Bean v. Western etc. R. R. Co.*, 107 N. C. 731. It is negligence on the part of a railroad company to allow defects in its road-bed, and it will be liable for damages if injury result therefrom: *Rutherford v. Shreveport etc. R. R. Co.*, 41 La. Ann. 793; *Bridgers v. Dill*, 97 N. C. 222; *Little Rock etc. R'y Co. v. Cagle*, 53 Ark. 347. Whether or not the company used due diligence to ascertain defects is a question for the jury: *Central R. R. Co. v. Kent*, 84 Ga. 352.

**RAILROAD COMPANIES — RISKS NOT ASSUMED BY EMPLOYEES.** — Where an employee is instructed to do some dangerous act which could be rendered safe by the exercise of special care by the master, he may assume that such care was taken: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note. An employee assumes only the hazards incident to the employment, and not those whose existence is inevitably dangerous, and of whose existence he could not know: *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. Rep. 436, and note. A brakeman does not assume the risk of being injured by defective bumpers on cars that he is coupling: *Goodrich v. New York etc. R. R. Co.*, 116 N. Y. 398, 15 Am. St. Rep. 410, and note; *Missouri etc. R'y Co. v. Barber*, 44 Kan. 612; *Cincinnati etc. R'y Co. v. Roesch*, 126 Ind. 445.

**RAILROAD COMPANIES — EMPLOYEES ONLY BOUND TO EXERCISE CARE IN LINE OF DUTY.** — An employee is not bound to inquire as to latent defects, but only patent ones, in machinery. It is the duty of his employer to make such inquiries: *Myhan v. Louisiana etc. Co.*, 41 La. Ann. 964; 17 Am. St. Rep. 436, and note. A railroad company is liable to its servants for the negligence of an officer whose duty it is to keep its road in safe condition, and fails to perform his duty: *Kansas City etc. R. R. Co. v. Kier*, 41 Kan. 661; 13 Am. St. Rep. 311, and note.

**NEGLECT — BURDEN OF PROOF.** — The burden of proof of negligence as alleged in the complaint is upon the plaintiff; as alleged in the answer, upon the defendant: *Murray v. Missouri P. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601, and note.

## SCHUSTER v. BAUMAN JEWELRY COMPANY.

[79 TEXAS, 173.]

**SEPARATE PROPERTY OF WIFE, LAND PURCHASED ON CREDIT IS, WHEN. —**

Land purchased for a wife and conveyed to her, she paying with her own money part of the consideration down, and giving notes signed by her husband and herself for the remainder, which notes are subsequently paid by money borrowed by her, the money thus borrowed being afterwards paid out of her separate funds, is her separate property. And in an action brought by the creditors of the husband to recover such land, a charge to the jury which admits of the construction that unless the notes given to the grantor for the purchase-money were directly paid by her with her separate money, she could not claim the benefit of the payment, although her separate funds paid the loan with which the debt to the grantor was discharged, is erroneous.

**EARNINGS OF MINOR SON, UNTIL EMANCIPATED, BELONG TO HIS FATHER,** and the creditors of the latter have the same right to look to them and to the property in which they are invested as to any other effects of their debtor.

**MERE FAILURE TO CHARGE JURY ON PARTICULAR POINT IS NOT ERROR,** when no instructions upon that point have been requested.

**JUDGMENT AFFIRMED IN PART AND REVERSED IN PART WHEN.** — Where the judgment of the trial court is correct as to two out of three tracts of land, the titles to which grew out of transactions wholly distinct from each other, and erroneous as to the third tract, the supreme court will reverse it as to the latter tract and affirm it as to the other two tracts.

**ACTION to recover three tracts of land.** The opinion states the case.

*F. M. Henry, and Henry and Henry, for the appellants.*

*Talbot and Turner, for the appellee.*

**GAINES, A. J.** This action was brought by appellee to recover of appellants, F. L. Schuster and Sophia Schuster, his wife, three separate parcels of land in Bowie County. One, a tract of twenty acres, was conveyed to the wife February 17, 1881; another, a city lot, January 19, 1882; and the third, also a tract of twenty acres, September 25, 1885.

The husband being indebted to appellee, the latter, subsequent to the last conveyance, caused an attachment to issue against his property and to be levied upon the lands in controversy. A judgment was obtained against Schuster on the attachment, and by virtue of an execution issued thereon the lands were sold by the sheriff and were bid off by and conveyed to the appellee.

Notice was given at the sale that the lands were claimed by Mrs. Schuster as her separate property. Whether they belonged to her separate estate, or not, was the question upon the trial of the case. The trial resulted in a verdict and judgment for the plaintiff for undivided two thirds of the first parcel, and for the whole of the third, and for the defendant Mrs. Schuster for the whole of the second and an undivided third of the first.

The title of the defendant Mrs. Schuster to each parcel of the land in controversy was dependent upon a different state of facts, as disclosed by the evidence.

The court, in its charge to the jury, did not apply the law to the facts of each of the three transactions, but gave the following general instructions: "You are instructed that the judgment which has been offered in evidence before you in favor of plaintiff against F. L. Schuster and the execution issued on said judgment, the levy of the same on the land in controversy, and the sheriff's deed thereto, will authorize you

to render your verdict in favor of the plaintiff for the land in controversy, unless you believe from the evidence that the land in controversy is the separate property of the defendant Mrs. Sophia Schuster, that it was purchased and paid for with money given to her by her mother, and that the plaintiff had notice that the land in controversy was the separate property of Mrs. Sophia Schuster at the time they purchased it at sheriff's sale, in which event you will find for the defendants."

And again, "the burden of proof is on Mrs. Sophia Schuster to show by a preponderance of evidence that the land in controversy is her separate property; that it was purchased and paid for with money given to her by her mother; and if she has failed so to show, you will find for plaintiff."

It is complained that these instructions were erroneous and misleading. They are correct as applied to the lot conveyed to Mrs. Schuster January 9, 1882, and for that lot the verdict and judgment were in her favor. But as to the tract of land previously purchased, they were not strictly correct, and, as we think, may have misled the jury to her prejudice. That tract of land was purchased for and conveyed to her, and at the time of the purchase she paid one hundred dollars in money given to her by her mother. There were two deferred payments, each for one hundred dollars, for which she and her husband gave their promissory notes to the grantors in the conveyance. These notes were paid with money borrowed by her for the purpose. The money so borrowed was repaid with funds given to her by her mother after the deed was executed.

The husband testified to these facts, and also that he did not buy the land for himself, but for his wife. There was no testimony tending to any contrary conclusion. He also swore that at the date of the transaction he was solvent, and gave the dates of several gifts of money to his wife by her mother, the several items amounting to sixteen hundred dollars.

The principle applied in *Ullmann v. Jasper*, 70 Tex. 446, is the law of this case. There the wife, having separate funds, purchased two lots, partly on a credit. For convenience, the cash payment was applied wholly to one lot, the other being bought wholly on a credit. The deferred payment was made with the wife's means, though the note of the husband was given for it. It was shown that the vendor did not look to him for payment. It was held that the lot purchased on a

credit and conveyed to her in her name, and paid for with her money, became her separate property. It is true that in the present case the wife borrowed the money to make the deferred payments. But she repaid the loan with her separate money. We do not see that this makes any substantial difference between the two cases. The property was bought for the benefit of Mrs. Schuster's separate estate, and was directly paid for in part with her money. It was understood that the balance was also to be paid from her separate funds; and it was in fact so paid, though not directly. A special instruction should have been requested upon the point. But the charge given admits of the construction that unless the notes given for the purchase-money were directly paid with Mrs. Schuster's separate money, she could not claim the benefit of the payment, although her funds paid the loan with which the debts to the grantors were discharged. If the jury did not so construe it, they should have found a verdict for her upon this issue. The charge was at least misleading, and calls for a reversal of the judgment as to the tract of land conveyed to Mrs. Schuster on February 17, 1881.

As to the land purchased September 26, 1885, we have quite a different case. The wife's equity in such cases arises from the actual investment of her separate money or the transfer of her separate property. That tract was paid for in part with a pony valued at one hundred dollars, and Mrs. Schuster executed two promissory notes amounting to two hundred dollars for the balance of the purchase-money, with a mortgage on the land to secure them. At the time of the trial they had not been paid. Her husband testified that the pony had been given to her by her son, and that the son, who was only nineteen years old, had worked and made money and bought the pony. The son testified to the same facts. The father is entitled to the services of his minor son. But he may emancipate him and make his future earnings his own; and it may be that creditors have no claim upon the filial obligation and cannot complain that such action is in fraud of their rights. But until he is emancipated the son's earnings belong to the father, and the creditors of the latter have the same right to look to them and to the property in which they are invested as to any other effects of their debtor. If the son of the defendants had been emancipated at the time the pony was bought, he and his father best know the fact. Neither of them testified to any formal emancipation or to any circumstance

reasonably sufficient to justify the inference that an emancipation in fact actually existed. It results that the pony was in law the property of the father, and the mother acquired no separate right in the land which was paid for in part by it. As to this branch of the case, the court, at the request of the appellee, gave an instruction which cured any imperfection in the main charge existing by reason of its generality. That instruction was as follows:—

“If you believe from the evidence that the purchase price paid by Sophia Schuster or by F. L. Schuster for the tract of land deeded to the said Sophia Schuster on the twenty-sixth day of September, 1885, was three hundred dollars, consisting of one horse valued at one hundred dollars and two notes for the balance, and that said horse was the separate property of Sophia Schuster, and that said notes are still outstanding and unpaid, then one third of said tract of land would be the separate property of said Sophia Schuster and two thirds of said tract of land would be community property of said F. L. and Sophia Schuster.”

But that instruction is itself assigned as error, upon the ground that it is abstract. The charge was applicable to one phase of the case presented by the evidence with reference to the land last conveyed. If a charge was deemed necessary with reference to the state of the title in case the jury should find that the pony was community property, the defendants should have asked that such charge be given.

Other assignments complain of the court's failure to charge upon certain phases of the case. But when no instructions are requested, a mere failure to charge upon a particular point is not error. The last assignment of error is too general.

A separate suit could have been brought for each of the three parcels of land for which this action was brought. The controversies as to the several titles grew out of transactions wholly distinct from each other. Such was the case of *Cooper v. Lee*, 75 Tex. 114, in which this court found error in the proceedings as to one tract of land, but no error as to another tract which had been recovered in the same judgment in the court below. In the first instance the judgment, as a whole, was reversed and the cause remanded, but upon a motion for a rehearing and to reform the judgment, the court affirmed the decree below as to the one tract and reversed and remanded the cause as to the other. (It is to be noted that the action upon the motion does not appear in the report of

the case.) In the present case we find reversible error as to the tract of land first conveyed to Mrs. Schuster, but no error as to the last. She recovered the city lot bought January 9, 1882. The judgment of the court below will accordingly be reversed as to the tract of twenty acres of land conveyed to Mrs. Schuster February 17, 1881, and the cause remanded for a new trial as to that. It will in all other respects be affirmed. The appellants will recover the costs of this court, except the costs to be allowed the clerk for indexing the statement of facts.

Affirmed in part. Reversed and remanded as to one tract of land sued for.

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**HUSBAND AND WIFE—SEPARATE PROPERTY, WHAT IS.**—If a wife purchases property, paying therefor partly out of her separate estate and partly with moneys borrowed on the faith of her existing property, and secured by a mortgage thereon, in which and the note which it is given to secure the husband also joins, the whole purchase is her separate estate: *Fournoy v. Fournoy*, 86 Cal. 286; 21 Am. St. Rep. 39, and note 43, 44.

**PARENT AND CHILD—SERVICES OF MINOR CHILD.**—A father, or one *in loco parentis*, is entitled to the earnings of his minor child, unless he has emancipated him: *Halliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note; *Savings Bank v. McLean*, 84 Mich. 626; *Otis v. Hall*, 117 N. Y. 131; *Harris v. Smith*, 79 Mich. 55; *Gerber v. Bauerline*, 17 Or. 115; *Barkite's Appeal*, 126 Pa. St. 404. When a child continues to live with and work for his parent, after arriving at full age, the presumption is that such services were gratuitous: *Young v. Herman*, 97 N. C. 280; *Spittmiller v. Fisher*, 77 Iowa, 289.

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## DUGAN v. LEWIS.

[79 TEXAS, 346.]

**RATE OF INTEREST, CONFLICT OF LAWS RELATING TO.**—Where money is borrowed in one state upon real estate situated in another, at a rate of interest lawful by the law of the latter state, but usurious by the law of the former state, and the note and deed of trust are dated and signed in the state where the real estate is situated and the borrower resides, but are delivered and the money paid in the state where the agreement is made and in which the note is payable, the contract, neither party thereto intending to evade or violate the law, will be regarded as made in reference to the law of the state in which the real estate is situated, and to the rate of interest allowed there, and must be governed by that law in the construction and effect of the contract as to its validity; and the courts of the latter state will not restrain the enforcement of the deed of trust on the ground that the contract is usurious and void.

**CITIZEN OF ONE STATE CONTRACTING DEBT WITH CITIZEN OF ANOTHER MAY AGREE TO PAY INTEREST ACCORDING TO LAW OF EITHER STATE;** and where the parties to the contract distinctly provide, or where from

other facts their intention can be satisfactorily ascertained, their making it in one state rather than in the other, or making it payable in one state instead of in the other, is not of controlling influence over the question. But usury laws cannot be evaded under cover of naming a state whose laws shall control the contract.

**PROVISION OF CONTRACT CONSIDERED IN ASCERTAINING INTENTION OF PARTIES.** — A provision in a deed of trust given to secure the payment of money loaned, that "the contracts embodied in this conveyance and the notes secured hereby shall in all other respects be construed by the laws of the state of Texas, where the same is made," may be considered in ascertaining and giving effect to the intention of the parties to the contracts.

**UNACCRUED INTEREST DOES NOT MAKE CONTRACT USURIOUS WHEN.** — Where a note payable in five years contains a stipulation that, upon failure to pay any one of the interest coupons, the whole sum of money shall become due and payable at the option of the holder, unaccrued interest cannot be regarded as coming within the proper meaning of this stipulation, so as to make the contract usurious.

**INJUNCTION.** The opinion states the case.

*Brown and Bliss, E. C. McLean, and J. W. Findlay, for the appellants.*

*Brown and Hall, and A. T. Watts, for the appellees.*

**HENRY, A. J.** G. H. Dugan, who at the time was a resident citizen of the state of Texas, acting through an agent in the state of New York, borrowed from the American Freehold, Land, and Mortgage Company, of London, England, the sum of five thousand dollars.

Dugan executed his note in favor of the mortgage company for said sum, payable at the office of the Corbin Banking Company in New York City five years after date, with interest from date at the rate of eight per cent per annum, for which five coupon notes were attached to said note. The note contained a stipulation for the payment of ten per cent attorney fee if it should be collected by suit, and another, making the principal of the note become due at the option of the holder thereof upon the failure to pay any installment within thirty days after it should become due.

Dugan, to secure said note, executed a deed of trust upon land in Texas, in which one Sherwood, the agent in New York of the lender, was made trustee. The agreement to lend the money was made in the state of New York, and the deed of trust and the note were delivered to the lender in that state. The five thousand dollars was paid to Dugan's agent in the state of New York.

The note and coupons and the deed of trust were dated and signed by Dugan in the state of Texas. The deed of trust contained the following clauses: "Upon the failure of the borrower to pay said note or either of said coupons, or failure to comply with any of the stipulations contained in the said deed of trust, the whole sum of money secured thereby may, without notice to the borrower, at the option of the lender or his assigns, and at his option only, be declared due and payable at once. The contracts embodied in this conveyance and the notes secured hereby shall in all other respects be construed according to the laws of the state of Texas, where the same is made."

At the date of these transactions, the rate of interest in the state of New York was six per cent, and the reservation of a greater rate rendered the contract void.

Dugan made default in the payment of interest, and the whole amount was declared due.

Out of the \$5,000, the sum of \$2,135.66 was used, without its reaching Dugan's hands, to pay off a prior mortgage upon the land.

For the purpose of paying the Corbin Banking Company for its services in procuring the loan, Dugan executed two other notes, and secured them by a second deed of trust upon the same land,—one for \$300 and the other for \$450, both bearing ten per cent interest from date.

They were both executed and delivered in Texas. They were made payable to C. W. Lewis, who resided in Texas, at the office of the Corbin Banking Company in the state of New York. Lewis had no pecuniary interest in these notes, and he transferred them to the Corbin Banking Company.

This suit was brought by appellants to restrain the enforcement of the deed of trust, on the ground that the contracts are governed by the laws of the state of New York, and are therefore usurious and void.

The cause was tried without a jury, and the court, upon a finding of facts, from which we have taken the foregoing statement, rendered judgment in favor of the defendants.

The subject of the conflict of laws of interest and usury, as affecting the enforcement of contracts, has been much discussed, and opinions have conflicted, sometimes as to the law and at others as to the effect of different conditions of fact.

In the case of *Connor v. Donnell*, 55 Tex. 174, this court said: "If the note sued on be made in New York, and be



also expressly made payable at a point in that state, then the question of usury will be controlled by the law of New York. It is believed that no authority can be adduced to the contrary." We find a very great number of authorities announcing the same doctrine upon a like state of facts.

This case contains also the following language: "Although a note be actually made and indorsed by citizens of Texas in New York, and be there discounted by a citizen of New York at a rate lawful in Texas, but usurious in New York, if by date and tenor of the note it appears that the parties intended to make it payable in Texas, and contracted with reference to the laws of Texas, the courts of this state follow the authorities which hold such a note valid"; citing *Bullard v. Thompson*, 35 Tex. 319; *Depau v. Humphreys*, 8 Martin, N. S., 1; and *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264.

The two cases last named have been much discussed and doubted and opposed by courts whose decisions would hold the contract now under consideration obnoxious to the charge of usury.

Both cases are criticised and their correctness questioned by Story in his work on the conflict of laws.

The Louisiana case is stated by him as follows: "The note was given in New Orleans, payable in New York, for a large sum of money, bearing an interest of ten per cent, being the legal interest of Louisiana, the New York legal interest being seven per cent only. The question was, whether the note was tainted with usury, and therefore void, as it would be made in New York. The supreme court of Louisiana decided that it was not usurious; and that although the note was made payable at New York, yet the interest might be stipulated for either, according to the law of Louisiana or according to that of New York."

The supreme court of the United States has approved this doctrine in the cases of *Miller v. Tiffany*, 1 Wall. 298, and *Cromwell v. County of Sac*, 96 U. S. 52.

In the case last mentioned the opinion contains the following expression: "When the rate of interest at the place of contract differs from the rate at the place of payment the parties may contract for either rate, and the contract will govern"; citing the above-named cases, and also *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; and *Butters v. Olds*, 11 Iowa, 1.

In the case of *Bullard v. Thompson*, 35 Tex. 319, it was said by this court: "They [the notes] were dated at Matagorda,

Texas, and whether they were actually executed in New York or in Texas, it is evident that the parties intended them to be paid in accordance with the laws of Texas; otherwise it would seem that they had voluntarily entered into a contract within the state of New York, to be executed in accordance with its laws, when the contract was within itself repugnant thereto": Page 407.

The case of *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264, as stated by Story, was as follows: "A citizen of New York applied in England to a British subject for a loan of money upon the security of a bond and mortgage upon land in New York, at the legal rate of interest (seven per cent) of that state; and it was agreed that the borrower should, upon his return to New York, execute the bond and mortgage and duly record the same; and upon the bond and mortgage being received in England the lender agreed to deposit the money loaned at the bankers of the borrower in London for his use; and the bond and mortgage were executed and received, and the money paid accordingly to the bankers. The question arose whether the transaction was usurious or not, and that depended upon the law of the place by which it was to be governed, whether by the law of England (where interest is only five per cent) or by the law of New York. It was held by the court that the contract was to be construed according to the laws of New York, and therefore that a bill to foreclose the mortgage filed in New York was maintainable, and that the law of usury of England was no defense to the suit. On that occasion the learned chancellor said that as no place of payment was mentioned in the bond or mortgage, the legal construction of the contract was, that the money was to be paid where the obligee resided, or wherever he might be found; that the residence of the obligee being in England at the time of the execution of the bond, that must be considered the place of payment, for the purpose of determining the question where that part of the contract was to be performed; and that the execution of the bond in New York did not make it a personal contract there, because it was inoperative until received in England and the money deposited with the bankers for the borrower. And he concluded by saying: 'Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclu-

sion that this mortgage executed here, and upon property in this state, being valid by the *lex situs*, which is also the law of the domicile of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon the lands here": Story's Conflict of Laws, 400, 401.

In the opinion itself it is further said: "No doubt appears to have been entertained as to the validity of a loan upon a bond and mortgage actually executed in Ireland or the colonies, although the loan itself was made in England and was made payable there, or to a mortgagee who resided there. . . . Here the verbal contract for a loan upon the security of a mortgage upon lands in this state was wholly inoperative until the mortgage and other written security were executed in this state. . . . It was a contract partly made in this state and partly in England, and being actually made in reference to our laws and to the rate of interest allowed here, it must be governed by them in the construction and effect of the contract as to its validity: *Chapman v. Robertson*, 6 Paige, 631, 634; 31 Am. Dec. 264.

If it be admitted that in the absence of an express stipulation as to the place of the payment of the debt it was payable at the residence of the obligor in New York, instead of the residence of the payee in England, the principle of the decision will not be affected, as it was expressly placed upon the ground that the debt was payable in England. The case decided was that a debt contracted in England by a resident of New York, payable in England, and the money received there by the borrower, secured by a note and deed of trust upon land in the state of New York, which was signed in that state, but delivered to the lender in England, and stipulating for a rate of interest lawful in New York, but usurious in England, was valid and enforceable in a court of New York.

The case decided was in every material respect similar to the one now before us: *Kilgore v. Dempsey*, 25 Ohio, 415; 18 Am. Rep. 306; *Townsend v. Riley*, 46 N. H. 308; *Fitch v. Remer*, 1 Biss. 337.

In the case of *Arnold v. Potter*, 22 Iowa, 195, the plaintiff, who was a resident of the state of Massachusetts, sued the defendant, who resided in Iowa, upon a debt contracted in the state of Massachusetts and payable in New York, for a rate of interest usurious in both of said states, but lawful in

Iowa. The notes and trust deed were delivered in the state of Massachusetts and the money was received there by the borrower. The defendant pleaded usury, and contended that the contract was to be governed either by the laws of New York or Massachusetts.

The plaintiff contended that it was an Iowa contract, and made in good faith with reference to her laws.

The supreme court approved the following charge, given by the judge of the district court: "If defendant went to Boston and urged the loan, and promised ten per cent under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than ten per cent was contracted for, then the defense fails, and plaintiff can recover. If the parties in good faith loaned and borrowed the money sued for, with a full understanding that the law of Iowa was to govern as to the interest, then the laws of New York and Massachusetts can have no influence here, but the understanding of the parties must prevail."

In the opinion of the supreme court it is said: "Parties may in good faith contract with reference to the law of the place where the payor resides, and where the property upon which the security is taken is located."

In Randolph on Commercial Paper it is said: "If the money is employed on the land mortgaged, and borrowed for that purpose, it has been held that the *lex loci rei sitæ* should apply": Page 23; Wharton's Conflict of Laws, sec. 510; *Fitch v. Remer*, 1 Biss. 337.

We readily concur in the rule announced by the supreme court of the United States, and the doctrine of the cases cited, which are in entire harmony with it.

The doctrine established that a citizen of one state contracting a debt with a citizen of another may make the interest according to the law of either. The solution of such a case as the one now before us cannot long be doubtful; for the contracting parties having the right to enforce their own wishes on the subject, the mere form of manifesting their purpose cannot be treated as of importance.

There is no reason why their making their contract in one state instead of in the other, nor why their making it payable in one state instead of in the other, should have a controlling influence over the question.

Doing either will, in the absence of other evidence, serve to show their purpose, and control the result.

But not so when they otherwise distinctly provide, or when from other facts their intention can be more satisfactorily ascertained.

It must be kept in view that usury laws cannot be evaded under cover of naming a state whose laws shall control the contract.

It is difficult, however, to conceive how that result can ever proceed from the state of the actual residence of the debtor being named.

The difficulty is emphasized when the right of the parties to contract with reference to the laws of that state is conceded, without there being any difficulty on the subject, except the method of developing the intention.

It is not entirely clear to us that the language contained in the deed of trust that "the contracts embodied in this conveyance and the notes secured hereby shall in all other respects be construed by the laws of the state of Texas, where the same is made," has reference to the rate of interest except in a general way. The question as it is involved in this case can hardly be said to be a question of the construction of the contracts.

We think, however, that the expression should be taken as a circumstance to be considered in ascertaining and giving effect to the intention of the parties to the contracts.

It is contended that as the deed of trust provides that on failure of the borrower to pay said note, or either of said coupons, or failure to comply with any of the stipulations contained in said deed of trust, the whole sum of money secured thereby may, without notice to the borrower, at the option of the lender or his assigns, and at his option only, be declared due and payable at once, and the trustee was authorized to take possession and sell the land; and as default was made in the payment of the coupon due December 1, 1887, and the whole amount was declared due, the whole five years' interest became collectible, according to the terms of the contract, long before the termination of the five years, thus making the interest reserved greater on the happening of the contingency than twelve per cent per annum, and the contract usurious under the laws of this state.

We do not think that a correct construction of the contract will make a greater amount of interest due and collectible upon it than shall have accrued on the principal calculated up to the date of collection at the rate named in the note; or

in other words, that any unaccrued interest comes within the proper meaning of the stipulation.

In any event, we agree with the conclusion of the judge before whom the cause was tried, that said stipulation "is to be construed as a penalty which will not be enforced except upon canceling the unearned interest notes, and that it does not make the contract usurious."

We find no error in the proceedings, and the judgment is affirmed.

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**INTEREST — CONFLICT OF LAWS.** — Where the parties are silent, the laws of the state where the note is made will fix the rate of interest which it is to draw: *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651; *Stickney v. Jordan*, 58 Me. 106; 4 Am. Rep. 251; *Martin v. Johnson*, 84 Ga. 481. But the parties may, by contract, fix the rate of interest according to the laws of another state, where one or both of them reside; *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690; *Mott v. Rowland*, 85 Mich. 561; *Kilcrease v. Johnson*, 85 Ga. 600. Compare *Gamble v. Central R. R. etc. Co.*, 80 Ga. 595; 12 Am. St. Rep. 276, and note.

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## HARN v. SMITH.

[79 TEXAS, 310.]

**DIVISION LINE MAY BE FIXED BY PAROL AGREEMENT, THOUGH PARTIES MISTAKEN AS TO ITS TRUE LOCALITY.** — Where adjoining owners of land are in doubt as to the location of the division line between them, they may fix it by parol agreement; and such agreement will bind them mutually, although they were mistaken as to the true locality of the line, there being no fraud or misrepresentation by either party.

**ADVERSE POSSESSION, WHAT SUFFICIENT TO GIVE TITLE.** — Actual, exclusive, adverse, and continuous possession of land by a person occupying and claiming the same as his own for more than ten years gives him a good title thereto.

**COVENANT OF WARRANTY NOT BROKEN BY LOSS OF TITLE BY LIMITATION.** — The covenant of warranty in a vendor's deed cannot be extended to cover future laches of the vendee, by which he loses, by limitation, the title to the land conveyed to him. A vendor can acquire from his vendee title by limitation after the deed is executed.

**ACTION to recover land.** The opinion states the case.

*Andrews and Lessing*, for the appellant.

No brief for the appellee.

**COLLARD, J.** Appellant's first assignment of error is to the effect that the court erred in overruling plaintiff's exceptions to defendant's trial amendment setting up an agreed boundary and division line by acquiescence and estoppel, be-

cause there was no consideration for such agreed boundary; that the divisional line being certain of ascertainment, there could be no dispute or doubt concerning it as to form the basis of an agreed boundary; "and because acquiescence alone will not suffice to fix a conventional line for a true one, if the true one can be ascertained, and the amendment disclosed no facts estopping plaintiff from recovering his land to the true line."

The exception referred to was made to the original answer, "wherein defendant set up an estoppel against plaintiff on account of boundary by agreement and acquiescence, and says the facts alleged do not create an estoppel."

The allegation in the original answer merely alleged that Herring, more than thirteen years ago, then owner of the northwest half of the ten-acre lot, with the consent, acquiescence, and approval of defendant, built a fence along a line which was then conceded and agreed to by said Herring and defendant to be the true division line, etc. This exception was sustained by the court in so far as the answer failed to show that any dispute had arisen when the agreement is alleged to have been made.

The trial amendment was then filed by leave of the court, wherein it is alleged, in addition to what had been before alleged, that the true location of the lot was not well defined and known, and various surveys had left it uncertain. It was also alleged, that "in consideration that Herring, at his own expense, would build a good and sufficient fence dividing said lot as then inclosed from east to west equally, it was agreed by and between defendant and said Herring that said fence should belong equally, as a division fence of said lot, to said Herring and defendant, and should be held as the true divisional line of said lot; that said fence was built in 1875 or 1876, and has ever since been held, regarded, and acquiesced in as the true division line, until this suit was brought."

We understand that where parties are in doubt as to where the true division line between them of their lands may be, they may fix it by parol agreement, which would be mutually binding upon them, even though they were mistaken as to its true locality. Where the parties knew where the divisional line was, such an agreement would not, it is said, be binding, because it would be a parol conveyance of land, and contrary to the statute of frauds: 1 Wait's Actions and Defenses, 718,

719; *George v. Thomas*, 16 Tex. 89; 67 Am. Dec. 612; *Coleman v. Smith*, 55 Tex. 254; *Browning v. Atkinson*, 46 Tex. 608, 609.

The rule is stated by Judge Quinan in *Coleman v. Smith*, 55 Tex. 259. After exhaustive research, he says: "Whether the parties were right or wrong in their belief that the line they established was precisely where it ought to be was wholly immaterial. It is enough if there were doubt or dispute between them about it, and they determined to settle it upon that basis." See the case and authorities there cited. We think the averments in the trial amendment as to uncertainty of the boundary sufficient to predicate an agreement upon fixing the division line between the adjacent owners.

The court below, in our judgment, did not err in overruling the exceptions to the trial amendment, because if the facts alleged were true as to the agreed division line, it was binding upon Herring and his vendees.

The next assignment of error insisted on by appellant is, that the court below erred in finding that defendant and plaintiff's vendee, Herring, had established a divisional line by agreement binding on plaintiff, because the proof shows that the true line was easy of ascertainment, and that the agreement upon a line was a mutual mistake, both parties believing it to be the true divisional line; and because there was no consideration for the establishment of a line depriving plaintiff or his vendors of their land, because there were no acts of plaintiff or his vendors in regard to a division line to the injury of defendant.

This assignment, in effect, admits that such an agreement of the line was made; but if it did not, the evidence shows that there was such an agreement between Herring while he was the owner of the northwest half of the lot, and defendant's husband, the owner of the other half, in the fall of 1875. It was proven that at that time the lines of the ten acres and other surveys adjoining, made by Scott in subdivision of one hundred acres, of which the ten acres were a part, were in confusion, and Herring and Robert Smith determined to divide the ten acres; they assumed as the northwest corner of the ten acres a stake in the upper northern limits of the western fence, which Robert Wilson had before pointed out to Herring in making a survey of his subdivision of one hundred acres adjoining the ten acres as the northwest corner of the



ten acres, and chained down the western fence one half the distance called for in the field-notes of the ten acres, and then chained and staked off the distance called for across the ten acres. Upon this cross-line a staked and ridered fence was built by Herring by agreement of defendant's husband that it should be a division line between them of the ten acres. Defendant had knowledge of the building of the fence; has ever since regarded it as, and both Herring and defendant thought it was, the true divisional line. This line was some thirty or forty feet above or northwest of the line as actually now ascertained to be the true line as shown by recent survey, and such line could have been ascertained with accuracy from the well-established south line of the Stephens league, which at this point was identical with the south line. But whether the line was easy or difficult of ascertainment is not the question. At the time the line agreed on was made, the respective owners did not know where it was, and adopted the method of agreement to establish it. They desired to settle the question, and did so by agreement. A fence was built on the agreed line as a common fence between the parties, or the line. They were competent to make the agreement, and whether it was a correct line or not is not material to the validity of the same. If the fact that the parties were mistaken in fixing the line could invalidate the agreement, no such agreements could ever stand unless they designated the exact line. There was no fraud or misrepresentation by either party.

We do not think the court erred in holding the agreement valid and binding on the parties, and that the court did not err in refusing to disturb it.

But suppose this question should be waived, and for sake of the argument it be admitted that there never was a division line made, and that plaintiff runs south of the fence as claimed, it seems to us clear that defendant should recover the disputed land on her plea of title by limitation under the statute of ten years as found by the court below.

There is no question but that defendant had had exclusive, adverse, and continuous possession, occupying and claiming the same as her own, for more than ten years before suit, and there is no question but that she had the actual possession up to the fence for such period. She could not extend her possession by construction over the boundary of her land as described in her deed, but actual possession and occupancy, claiming under the conditions of the ten years' statute, has

frequently been held to constitute a good defense against the owner: *Bracken v. Jones*, 63 Tex. 184.

But appellant says that defendant and her husband sold the land to Herring, under whom plaintiff claims, and warranted the title to him, and therefore she cannot claim title by possession against her and her husband's warranty, but that the title so acquired (if it could be) would inure to the warranty. We cannot agree to this. It had as well be said that the vendor cannot disseise his vendee or acquire a title from him. He can acquire title from his vendee by limitation (*Smith v. Montes*, 11 Tex. 25, 26) where the deed is executed: Rawle on Covenants, 898. The covenant of warranty will not defeat such title acquired after the deed. Such title is no breach of the covenant, which cannot be extended to cover future laches of the vendee by which he loses the title conveyed to him: *Stearns v. Henderass*, 9 Cush. 497; 57 Am. Dec. 65.

Finding no error in the judgment of the court below, our conclusion is, the same should be affirmed.

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**DIVISION LINES—PAROL AGREEMENTS.**—Where there is a dispute as to the true division line between adjoining proprietors, and they are ignorant of its true location, and they agree upon a permanent line and take possession accordingly, such agreement binds them and those claiming under them, even though it is not in writing: *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549, and note; *Hooten v. Comerford*, 152 Mass. 591. But a survey made for a grantee previous to his purchase will amount to an acquiescence on his part: *Keenigheim v. Sherwood*, 79 Tex. 508.

**ADVERSE POSSESSION—WHAT SUFFICIENT TO GIVE TITLE.**—To obtain title by adverse possession, the possession must have been open, notorious, exclusive, and continuous for the necessary period of time: *Faull v. Cooke*, 19 Or. 455; 20 Am. St. Rep. 836; *Mabary v. Dollarhide*, 98 Mo. 193; 14 Am. St. Rep. 639, and note.

**COVENANT OF WARRANTY—WHAT CONSTITUTES A BREACH OF:** See *Olmstead v. Kennedy*, 3 Litt. 118; 14 Am. Dec. 45, and note 53, 54.

# GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. WILSON.

[79 TEXAS, 571.]

**NEGLIGENCE, SUFFICIENT ALLEGATION OF, IN COMPLAINT.** — A complaint which alleges, in substance, that the railway car in which the plaintiff was traveling was derailed through the negligence of the railway company and its servants, and that thus the plaintiff was injured, is sufficient, without stating the particular acts of negligence which caused the derailment of the car and the injury to the plaintiff.

**LOSS OF TIME AND WAGES, INSTRUCTION AS TO, NOT ERRONEOUS WHEN.** — In an action to recover damages for personal injuries, a charge to the jury instructing them that if they found for the plaintiff they should take into consideration his loss of time and wages is not erroneous. No jury of ordinary intelligence would understand such charge to direct them to find damages both for plaintiff's loss of time and for the wages he would have earned during the time he was rendered, by his injuries, unable to labor.

**MAIL AGENT ON RAILWAY TRAIN TO BE REGARDED AS PASSENGER.** — A mail agent lawfully on a railway train, and entitled to transportation, is to be regarded as essentially a passenger, and entitled to recover for an injury resulting from the negligence of the company or of its servants, whether the company is compensated for his transportation by the charge for the car, or for the transportation of the property of which he has charge, or receives no compensation whatever for his carriage.

**INJURY TO MAIL AGENT TRAVELING IN MAIL-CAR, LIABILITY OF RAILWAY COMPANY FOR.** — A railway company is liable for injury received by a mail agent while traveling in a mail-car, by reason of the negligence of its servants, where the contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car.

**NEGLIGENCE, QUESTION OF, TO BE DETERMINED BY JURY WHEN.** — Where an injury to a passenger on a railway train results from the derailment of the train by running upon a calf upon the track, in view of the fact that the company has the right to fence its track, it is for the jury to determine whether or not the company was negligent.

**VERDICT NOT EXCESSIVE WHEN.** — A verdict for five hundred dollars will not be set aside as excessive where there is testimony to sustain it, and the testimony on the other side is not necessarily in conflict with that testimony.

**ACTION to recover for personal injuries.** The opinion states the case.

*J. W. Terry, Alexander and Clark, and J. T. Bottorf, for the appellant.*

*J. A. Carroll, and Smith and Bell, for the appellee.*

**STATTON, C. J.** Appellee was mail agent of the United States, whose duty it was to attend to the mail transported in

a coach set apart and fitted up for that purpose. This car was in the train in advance of the passenger-coaches, and was derailed, plaintiff alleged, through the negligence of appellant and its servants, whereby he was injured, and for this he brought this action, which resulted in a judgment in his favor for five hundred dollars.

An exception to the petition, on the ground that it did not state the particular acts of negligence which caused the derailment of the car and injury to the appellant, was overruled, and this is assigned as error.

This question was considered in *Gulf etc. R'y Co. v. Smith*, 74 Tex. 276. In that case, as in this, the averments of the petition were, in substance, that the car in which the plaintiff was, was derailed through the negligence of the railway company and its servants, and thus the plaintiff injured.

This was held sufficient, and the reasons for this ruling, as well as the citation of cases supporting it, will be found in that case.

There are some expressions in the opinion in *Missouri Pac. R'y Co. v. Hennessey*, 75 Tex. 155, which may seem to lead to a contrary conclusion; but an examination of the case will show that the question in it was, whether the plaintiff should have been permitted to prove an act of negligence not alleged, when he had alleged that the accident resulted from other specific acts of negligence.

The fifth assignment of error is not sustained by the record, in that it does not show that the court admitted evidence referred to in the assignment.

With others, the court gave the following charge: "I further instruct you that in estimating the damages you find for plaintiff, if you find any for him, you are to take into consideration the testimony as to physical pain and injuries inflicted, and whether such injuries are permanent or not, the expenses in doctors' bills or for medical attention, and his loss of time and wages; but you are not authorized to find damages for mental suffering or anguish, as that is not set forth and claimed in the petition."

It is urged that this was error, in that the jury probably understood from it that the plaintiff was entitled to recover for loss of time as well as the wages he could have earned during that time he was rendered by his injuries unable to labor; but it seems to us that no jury of ordinary intelligence would so have understood the charge.

The court gave the following charges:—

"1. Railway companies, in transporting passengers upon their trains, operated and managed by their employees, must, while thus transporting such passengers, exercise a high degree of care, in order to avoid accident or injury to such passengers; and the failure to exercise such care as a person of ordinary prudence under like circumstances would use is negligence.

"2. If you find and believe from the evidence that on the twentieth day of August, or at any time within one year next before the twenty-fifth day of October, 1887, a train of cars operated by the defendant company, its agents, servants, or employees, was wrecked in Bosque County, Texas, near Valley Mills, and that at the time of such wreck the plaintiff, R. J. Wilson, was traveling upon said train of cars as postal or mail clerk, in the employment of the United States government, and in charge of the mail matter on such train, then he would be entitled to recover of defendant company for such injuries as he may have received, provided they are such as are set forth in his petition, as resulted from the negligence (if there was negligence) of said company's servants, agents, or employees, not to exceed the amount of either kind of injury alleged in the different allegations in the plaintiff's petition.

"3. If the plaintiff, R. J. Wilson, was riding in the mail-car composing a part of said train, and in his proper place in said car, then the fact, if such be a fact, that it was a more dangerous place in which to travel than other cars composing said train would in no way affect the right of plaintiff to recover in this cause."

The court refused the following, which were requested by the defendant's counsel: "You are instructed that plaintiff sues the defendant in the capacity of a passenger, and that if you find from the evidence that plaintiff was a clerk or mail agent of the United States on defendant's train, such variance is fatal, and you will find for the defendant." "You are specially instructed, at the request of defendant, as follows: That if you believe from the evidence that plaintiff, R. J. Wilson, was a passenger on defendant's train, and that, instead of riding in one of the coaches provided for passengers, he voluntarily took an exposed position and rode in the express and mail car of the train, not induced to do so by the conductor and other employees of the defendant, and, thus remaining, was injured

in the wreck of the train, which injury he would have avoided if he had been in one of the passenger-coaches, that in this event he assumed the increased risk of riding in the express and mail car and thereby contributed to his own injuries, and cannot recover, and you will find a verdict for the defendant."

Plaintiff alleged that he was a passenger, and it was proved, without objection, that he was United States mail agent, and in the car where it was his duty to be, in charge of the mail, when the accident occurred.

The car was fitted up for that purpose, and while it was derailed, passenger-cars in the rear of it were not.

We are of opinion that essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another, not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents, or messengers, and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances.

Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the car or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person, is a matter of no importance.

It is enough that he is lawfully on the car and entitled to transportation to give to him the character of passenger and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part.

If there be necessarily more danger in traveling in the coach prepared and used for the transportation of mail, even where due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a mail agent assumes the risk of danger necessarily thus arising from the position of the mail-car in the train, but he does not assume any risk of danger that may result from the negligence of the carrier or its servants.

The charge which sought to relieve appellant from liability because appellee was in the mail-car, instead of a car prepared

and used for ordinary passengers, was properly refused in this case, because appellee was in the mail-car, the very place where appellant intended he should be and where his duty called him.

The contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car; and if appellant or its servants failed to use that degree of care prescribed by the charge of the court for his safety, then appellant was liable.

This is not a case in which a passenger was injured because he placed himself uninvited in a car in which the carrier did not intend he should travel, when with safety he would have been carried in the car intended for him.

It is urged that the court should have granted a new trial on the ground that no negligence on part of appellant or its servants was shown.

The derailment was caused by the locomotive coming in contact with a calf on the track, and the evidence was somewhat conflicting as to whether the animal might have been seen by the servants of appellant in time to have stopped the train before the collision occurred.

The animal, it is conceded, however, could have been seen when two hundred yards in advance of the train, and it was for the jury to determine whether a proper lookout was kept, as well as to determine whether proper effort was made to stop the train as soon as it was discovered on the track.

In view of the fact that a railway company has the right to fence its right of way, if this is not done the fact that a derailment is caused by contact with an animal is a fact which may be looked to in ascertaining whether or not the carrier exercised due care.

It is claimed that the judgment is excessive, in "that plaintiff utterly failed to prove that he sustained any injury except by his own statements and those of his father." If the jury believed their statements, the judgment cannot be considered excessive; and if the evidence of the physician who examined and treated him about one month after the accident occurred had conflicted with theirs, it was for the jury to determine the fact. We do not find, however, from an examination of the testimony of the physician and the others that there is necessarily any conflict in the evidence.

There is no error in the judgment, and it will be affirmed.

**RAILROAD COMPANIES—LIABILITY FOR INJURY TO EMPLOYEES OF OTHER COMPANIES RIGHTFULLY ON TRAIN.**—An express agent assumes the ordinary hazards incident to that business in his relation to that company, but not the risks of injury he might suffer from the negligence of the railway company: *Brasser v. New York etc. R. R. Co.*, 124 N. Y. 59; 21 Am. St. Rep. 647, and note. As to liability to mail agents, see *Baltimore etc. R. R. Co. v. State*, 72 Md. 36; 20 Am. St. Rep. 454, and note; *Nagoff v. Missouri P. R'y Co.*, 102 Mo. 540; 22 Am. St. Rep. 798; *Mellor v. Missouri etc. R'y Co.*, 105 Mo. 455.

**NEGLIGENCE—WHEN A QUESTION FOR THE JURY.**—If one is injured by a train of cars while crossing a street, and alleges negligence of the company in failing to ring the bell, and the evidence on this point is conflicting, the question is one of fact to be determined by the jury: *Murray v. Missouri etc. R'y Co.*, 101 Mo. 236; 20 Am. St. Rep. 601, and note; *Deans v. Washington etc. R. R. Co.*, 107 N. C. 686; 22 Am. St. Rep. 902, and note.

**VERDICTS.—WHEN EXCESSIVE AND WHEN NOT EXCESSIVE:** See *Missouri P. R'y Co. v. Jones*, 75 Tex. 151; 16 Am. St. Rep. 879, and note; *Ohio etc. R'y Co. v. Judy*, 120 Ind. 397.

## AUSTIN AND NORTHWESTERN R'Y CO. v. ANDERSON.

[79 TEXAS, 427.]

**NUISANCE—ACTION FOR INJURY FROM, NOT BARRED BY STATUTE OF LIMITATIONS WHEN.**—Where a nuisance is not permanent, but depends on accidents and contingencies, so that it is of a transient character, successive actions may be brought for injury resulting therefrom as it occurs; and an action for such injury will not be barred by the statute of limitations, unless the full period of the statute has run against the injury before suit. But if the nuisance is permanent and continuing, recovery for the entire damage resulting from it must be had in one suit.

**CAUSE OF ACTION FOR NUISANCE DOES NOT ACCRUE UNTIL INJURY SUSTAINED WHEN.**—Where a railroad embankment and culverts do not of themselves constitute a nuisance nor an invasion of a party's rights, not being put on his land, and only become a nuisance at intervals by diverting water from rainfalls from its usual flow upon his land, a cause of action does not accrue to him until the injury is sustained.

**CULVERTS AND SLUICES—DUTY OF RAILWAY COMPANY TO CONSTRUCT.**—In Texas, railway companies are by statute required, in constructing their tracks, to construct all necessary culverts and sluices required by the natural lay of the land, to prevent surface water from being diverted from its natural and usual course and thrown upon land, where it would not otherwise have gone.

**DAMAGE FROM SURFACE WATER DIVERTED BY RAILWAY EMBANKMENT—LIABILITY OF COMPANY FOR.**—Where a railway embankment and culverts divert surface water from its natural and usual course, and cause it to flow over a party's land, and permanently injure the same, and destroy his crops, the company will be liable for the injury so caused. But it will not be liable for any injury that would have resulted to the land by reason of the natural flow of the water, had the embankment and culverts not been built.



**INSTRUCTIONS PROPERLY REFUSED.** — A railway company, bound by law to so construct its road as not to divert the natural flow of surface water from its usual course, to the injury of adjacent lands, is not entitled to have the jury charged that "if the road-bed was constructed so as to let the water pass with as little injury to plaintiff as could be practically done without making the road insecure, then the defendant company would not be liable for injury from water-action after it left the right of way."

**SPECIAL INSTRUCTIONS REPEATING PRINCIPLES EMBODIED IN GENERAL CHARGE ARE PROPERLY REFUSED.**

**ACTION** to recover for damages to plaintiff's farm and crops, resulting from the improper construction of the defendant's road-bed. The facts appear from the opinion.

*Fisher and Townes*, for the appellant.

*E. T. Moore and Milton White*, for the appellee.

**COLLARD, J.** This action was brought against the appellant September 22, 1888, for damages for so constructing its road-bed and culverts in 1881 as to change the natural flow of surface water from ordinary rains, cause it to be collected in large quantities, and to be carried in large volumes down to and through certain culverts upon plaintiff's land, submerging it, washing away the soil, remaining on it for long periods of time, and rendering it wholly unfit and worthless for agricultural or other purposes. It is alleged that the injury was done in 1886, 1887, and 1888; that in October, 1886, a cotton crop was so destroyed, and in 1887 and 1888 cotton and corn crops were destroyed by having water from ordinary rains so carried upon the land.

Defendant contends that all the damages are barred by the two years' statute of limitations, because they are alleged to proceed from the improper construction of the road-bed and culverts built more than two years before the suit was brought.

The point is presented here by several assignments of error complaining of the ruling of the court in refusing to sustain special exceptions of defendant to the petition, giving charges and refusing charges.

The law as applied by the court below allowed plaintiff to recover for all injury occurring within two years prior to the institution of the suit, and no more. The question is, When did the cause of action accrue, — at the time of the erection of the embankment and culverts, or at the date of the injury?

Chief Justice Stayton, in the case of *Houston Water Works v. Kennedy*, 70 Tex. 233, discusses the question and gives us

a rule. He says: "When the act is in itself lawful as to the person who bases an action on injuries subsequently accruing and consequent upon the act, it is held that the cause of action does not accrue until the injury is sustained. . . . If, however, the act of which the injury was the natural sequence was a legal injury, — by which is meant an injury giving cause of action by reason of its being an invasion of plaintiff's right, — then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damage resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar."

In that case the action was for damages resulting to a building caused by weakening an arch in placing water-pipes in the house. It was held that the plaintiff could have maintained an action at once when the arch was weakened, and having failed to do so for more than two years, the action was barred. The weakening of the arch was an immediate injury, — an immediate invasion of the rights of the plaintiff.

In *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792, where an action was brought for injury to plaintiff's land by reason of a ditch dug by the city to carry a running stream of water along the side of the street, the constant action of the water causing the injury to the plaintiff's land, it was held that no suit could be maintained until some actual injury to plaintiff was caused by the action of the water resulting from the improper construction of the ditch; but the injury began, the premises began to be injured, at a time when it was barred before suit; it was of a permanent and continuous character, and it was held that the damage was original, and could have been compensated at the time it first began, the action of the water being a permanent and calculable force. The case distinguishes between a continuing and permanent nuisance and one that depends on contingencies, such as freshets and other forces that are incalculable.

Wood says (Wood on Limitation, 371) the rule in reference to acts amounting to a nuisance is, that "every continuance is a new nuisance for which a fresh action will lie, so that although an action for the damage from the original nuisance may be barred, damages are recoverable for the six years preceding the beginning of the action. . . . But while this is the rule as to nuisances of a transient character, yet when the original nuisance is of a permanent character, so

that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby, a recovery not only may, but must, be had for the entire damage in one action."

We conclude from the authorities that where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit; but where it is not permanent, but depends on accidents and contingencies, so that it is of a transient character, successive actions may be brought for injury as it occurs, and that an action for such injury would not be barred by the statute of limitation unless the full period of the statute had run against the special injury before suit. The building of the embankment and the culverts as alleged was not of itself a nuisance; it was no invasion of plaintiff's rights, — they were not put on his land. They become a nuisance only at intervals, by diverting water from rainfalls from its usual flow upon plaintiff's land. The embankment and the culverts were permanent, but the nuisance was not; there was no constant and continuing injury. It may be that where land is destroyed, and its value before destruction is recovered as damages, there can be but one recovery. The soil and improvements might be renewed, however, in which case other suits might lie for damage to its renewed state. But suppose the land is only injured or the crops occasionally destroyed by rains, the just and rational rule as adopted in this state is, that successive actions may be brought for the injuries as they occur: *Gulf etc. R'y Co. v. Helsley*, 62 Tex. 593. We agree with the court below in its holdings upon this subject.

Appellant consolidates the fourth, fifth and sixth assignments of error. They are directed to the following paragraph of the court's charge, and the refusal of the court to give special charges asked by defendant: "The defendant had a right to build its road-bed where it did, and, if necessary to its proper construction and use, to throw up the embankment shown to have been made; but in so doing it was required by law to construct all the necessary culverts and sluices required by the natural lay of the land to prevent surface water from being diverted from its natural and usual course, and thrown upon land, where it would not otherwise have gone."

This charge is the law as enacted by statute in this state: R. S., art. 4171. "It was intended in this class of cases to furnish a simple rule by which would be avoided the diffi-

culty which has been so often felt in adjusting the rights of persons under the conflicting decisions to which the arguments in this case refer": *Gulf etc. R'y Co. v. Helsley*, 62 Tex. 593. "It was intended," Justice Stayton proceeds to say in the case cited, "thereby to compel railways to construct such culverts or sluices as were necessary to permit water not confined within watercourses to flow after a railway is constructed as it did before, in accordance with the natural lay of the land," etc. The charge given was but preliminary to other instructions, and must be read in connection with them. So read, it was a proper charge: *Gulf etc. R'y Co. v. Donahoo*, 59 Tex. 131.

In the succeeding portion of the charge the learned trial judge gave the law applicable to the case. In effect, he told the jury that if the embankment and culverts diverted the surface water from its natural and usual course, and caused it to flow over plaintiff's land, and permanently injured the same, and destroyed crops, etc., the company would be liable for the injury so caused. The jury were guarded by the charge, so as not to include any damage occurring at a time that would be barred by the two years' statute of limitations, and they were also cautioned not to allow "for any injury, if any, as would have resulted to the land, if the embankment and culvert had not been built, by reason of the natural flow of water."

In estimating damages to crops, in case of such damages, the jury were told that they could "only allow for such injury as was caused by the embankment and culvert causing water to flow on said land which otherwise would not have flowed there." In addition to this, the jury were instructed that if the embankment and culverts diverted the water from its usual course, and contributed to damage the land and crops, but it should appear that the damage was caused in part by water falling and running on the land regardless of the embankment and culverts, then the defendant would be liable only for such proportion of the injury as was caused by the embankment; and if the verdict should be for plaintiff, it should be for only the damages occasioned by the embankment and culverts.

The instructions of the court were carefully prepared, and guarded every right of defendant.

The defendant complains because the court refused a special charge asked, to the effect that in case the jury should

find the land and crops were injured by the water passing through the culverts and sluices, but should also find that such water was less injurious to the whole of the lands and crops than it would have been if the road-bed had not been constructed and it had flowed according to the natural lay of the land, the verdict should be for defendant.

Such a charge should not have been given. The act of so constructing the embankment and culverts was wrongful, and it could not be made right by such a consideration. Such a comparison of detriments and betterments is not applicable to cases like this. It might be in a proceeding to condemn land for railroad purposes.

Appellant complains because the court refused a charge asked, to the effect that if the road-bed was constructed so as to let the water pass with as little injury to plaintiff as could be practically done without making the road insecure and unserviceable, then the company would not be liable for injury from water-action after it left the right of way. This charge is not the law. Defendant was bound to so construct its road as not to divert the natural flow of surface water from its usual course, to the injury of adjacent lands.

The court also refused to give a special instruction, asked by defendant, to the effect that if other obstructions on the land or in its neighborhood, not attributable to the embankment and culverts, caused the water to flow out of its usual course and damage plaintiff's land and crops, no verdict could be returned for such damage. Several charges of a similar purport, specifying obstructions and causes that might have been found to have changed the course of the water and turned it on plaintiff's land to its injury, which should not be charged to defendant in estimating damages, were asked, but the court refused all of them. There was no error in such refusal. The court had, in his general charge, given all the law applicable to the case, and sufficiently guarded the jury from finding any damages against defendant except such as resulted from the improper construction of the road-bed and culverts, and especially from awarding damages arising from other causes, regardless of the embankment.

We commend the charge of the court, and think there was no error in refusing to give requested charges which only repeated principles embodied clearly in the general charge, in so far as they were applicable.

We are of the opinion the judgment of the court below should be affirmed.

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**NUISANCES, STATUTE OF LIMITATIONS IN ACTIONS FOR:** *St. Louis etc. R'y Co. v. Biggs*, 52 Ark. 240; 20 Am. St. Rep. 174, and extended note 176-179, wherein is discussed nuisances caused by railway embankments.

**RAILWAY COMPANIES. — DUTY TO CONSTRUCT CULVERTS, ETC.:** See *Ross v. St. Paul etc. R'y Co.*, 41 Minn. 384; 16 Am. St. Rep. 706, and note; *Hinery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727, and note. Where a railroad bridge was improperly constructed, so that water did not freely pass under it, causing injury to the upper lands, a nuisance exists for which damages are recoverable; and the injured party need not presume that the nuisance will be a permanent one, but he may assume that it is transient, and instead of bringing one suit for his whole injury, he may sue for the amount of his injury as he suffers from its continuance: *Chicago etc. R. R. Co. v. Schaffer*, 124 Ill. 112.

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## PULLMAN PALACE CAR COMPANY v. SMITH.

[79 TEXAS, 468.]

**SLEEPING-CAR COMPANY** is answerable to plaintiff if its servants failed and neglected to awake the plaintiff and his wife in time to enable them to dress and get off the train at the station of their destination, and caused plaintiff and his wife to get off the train at a water-tank half a mile from the station, before daylight on a damp, cold morning in February, where they were compelled to stand for a long time in the rain, mud, and cold, not knowing where the station was, the train having moved off before they ascertained that the station had not been reached; and plaintiff's wife was made sick and her health permanently impaired by the exposure; and plaintiff was forced to provide medical aid for his wife and to pay for the same, to remain away from his home to attend to her, and suffered much mental anguish on account of her condition.

**EVIDENCE AS TO CAUSE OF ILLNESS, WHEN ADMISSIBLE.** — In an action by a husband to recover damages for the sickness of his wife, alleged to have been caused by her being set off the train by the defendant's servants before it reached the station, the following testimony given by her on the trial is competent and admissible: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train."

**OCCUPATION AND SALARY OF PLAINTIFF, EVIDENCE OF, WHEN ADMISSIBLE.** — Where one of the elements of damages alleged in the plaintiff's petition is his loss of his own time while attending and nursing his wife, his testimony as to his occupation, salary, and the time lost by him cannot be considered irrelevant.

**ERRONEOUS INSTRUCTION UPON QUESTION OF CONTRIBUTORY NEGLIGENCE, WHEN IMMATERIAL.** — Where there is no evidence as to contributory negligence in the case, an erroneous charge upon the question of contributory negligence can do no harm to the defendant, and is no ground for reversal of the judgment.

**SLEEPING-CAR COMPANY, DUTY AND LIABILITY OF, TO PASSENGERS. —**

Where a sleeping-car company undertakes to furnish sleeping accommodations to passengers, such accommodations being under its exclusive control, and receives compensation therefor, it is its duty to awake and notify passengers in time for them to prepare to safely and comfortably leave the train at the place of their destination; and if it fails to perform this duty, and injury results, it will be liable therefor, although the railway company might also be liable.

**ACTION to recover damages.** The opinion states the facts.

*Percy Roberts and R. P. Willing*, for the plaintiff in error.

*Shelton F. Leake, and Word and Charlton*, for the defendant in error.

**HENRY, A. J.** This suit was brought by the appellee against the Pullman Palace Car Company, a corporation, to recover damages.

The petition alleges that plaintiff and his wife engaged passage on a train of the Texas and Pacific Railway Company to Terrell, in this state; that, being such passengers, they, at a point in the state of Louisiana, applied to the defendant corporation for, and obtained from it, berths on the Pullman sleeping-car which was run in connection with the train on said railway; that shortly after entering said sleeping-car, plaintiff and his wife retired and were asleep; that under the rules and regulations of defendant, and by common usage and practice, defendant's agents in charge of said car were bound to awake plaintiff and his wife in time to enable them to dress and get off the train at Terrell, the place of their destination, and that they relied on them to do so; that said agents went to sleep and neglected their duty; that when said train reached the water-tank about one half mile east of the passenger depot at Terrell, which it did about five o'clock on the morning of February, 5, 1889, it was stopped for the purpose of taking on a supply of water, and for other purposes, and that this fact was known, or should have been known, to defendant's agents; that when said train had stopped at said water-tank, defendant's said agents awoke plaintiff and his wife, and told them that they were at the depot and to hurry off; that said agents caused plaintiff and his wife to get off of said car at said water-tank; that in the excitement and rush incident to the announcement that the train was at Terrell, and that all must hurry off, plaintiff's wife was pushed and shoved off and down the car-steps to the ground, some three feet in distance; that his

wife had no time to properly dress herself; that it was a cold and damp morning, dark, and misting rain; that the ground and grass were wet from recent rains; that as soon as plaintiff and his wife were off the train, and before they had learned of the mistake and that the depot had not been reached, the train moved off, and left them standing in the rain, mud, and cold; that plaintiff and his wife were strangers in Terrell, and did not know where the depot and hotels were situated; that it was so dark as to make it impossible for them to move with discretion, and that they were forced to remain standing at the water-tank for a great while in the rain, mud, and cold; that plaintiff's wife was greatly frightened, and was made sick by the exposure, and that she was confined to her bed and unable to care for herself for more than five weeks; that plaintiff was forced to provide medical aid for her and pay therefor, and that plaintiff was forced to remain away from his home (which was in the state of Louisiana) and his business to give his attention to his wife for more than two weeks, and suffered much mental anguish on account of his wife's condition; that his wife suffered greatly, and that her health was permanently impaired because of the premises.

We think that the petition states a good cause of action, and that there was no error in overruling defendant's demurrer.

Judgment was rendered in favor of the plaintiff on the verdict of a jury for \$1,125.

The wife of plaintiff gave her deposition as a witness, detailing very fully the circumstances of her exposure and sickness; and in reply to a question said: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train."

There was no error in overruling defendant's objection to this evidence.

The plaintiff, on his examination as a witness, made the following statement: "I was getting a salary of \$1,250 per annum, eight months' school, as professor in the state normal, and lost three weeks in attending my wife, which it was necessary for me to do." The defendant objected to the evidence, and now assigns error in its admission upon the ground that it was irrelevant.

One of the elements of damage stated in plaintiff's petition



was loss of his own time while attending and nursing his wife. Evidence tending to prove that issue cannot be considered irrelevant.

We find no error in the action of the court in permitting the physician who attended Mrs. Smith during her illness to state what she told him while he was treating her, about her exposure at the place where she left the train, in connection with his own opinion as to the cause of her sickness.

The statement was made as the basis of the doctor's opinion, and not as independent evidence to establish the fact of exposure. Even had the latter been the purpose, it would furnish no ground for the reversal of the judgment, as both the wife and the husband had as witnesses themselves fully stated every fact upon the subject, and there was no opposing evidence with regard to the circumstances attending their leaving the train and the exposure that followed it.

Appellant complains of the following extract from the charge of the court: "If defendant's agent was guilty of negligence to the plaintiff's damage, and plaintiff or wife were also guilty of negligence which contributed to the injury or damage, the defendant cannot be held liable for such damage or injury, unless it has been shown that the negligence of defendant's agent was the direct and proximate cause of the damage."

Abstractly considered, this charge was erroneous. It relieved the plaintiff from the effect of the contributory negligence of himself and his wife, if such negligence had existed.

The record, however, contains no evidence whatever tending to show negligence upon the part of the plaintiff or of his wife at the time the wrong was committed, and therefore no charge upon contributory negligence was called for or proper. The charge as given could not prejudice defendant under the proof.

While it is true that the contract for carriage was with the railroad company, and not with the defendant, and that the railroad company was under obligations to plaintiff as a carrier for which it would have been liable to him for damages if it had failed in its duty, it still remains to be said that the defendant also owed certain duties to the passengers: *Pullman P. C. Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31; *Pullman P. C. Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873.

The evidence shows that the Pullman car was hauled by

the railroad company, and that the porter and conductor on the sleeping-car were the servants and under the control of the sleeping-car company.

The record contains no evidence with regard to rules, regulations, or usages relating to the transportation of passengers on such cars. It does show that the defendant, and not the railroad company, received the compensation for and undertook to furnish the sleeping accommodations, and that they, at least, were under the exclusive control of the defendant.

Whatever may be the duty of the railroad company with regard to notifying its passengers, including such as may be in the sleeping-car, of its arrival at the station to which they are destined, we are not able to conclude that the servants of the defendant owe no such duty to the sleeping passenger. On the contrary, we think that the obligation to awake and notify the passenger in time for him to prepare to safely and comfortably leave the train at the point of his destination is directly involved in the contract for the use of the sleeping-berth.

In this case the servant of the defendant assumed the discharge of that duty, and from that fact, as well as the failure of the defendant to introduce any evidence explaining what the duties of its servants were or as to what are the usages and rules in force on its cars, it may properly be presumed that the servant of defendant was acting within the scope of his employment. There can be no doubt that the negligent discharge of the duty resulted in damage to the plaintiff.

The judgment is affirmed.

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**SLEEPING-CAR COMPANIES—RIGHTS, DUTIES AND LIABILITIES ON:** See *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 53; 21 Am. St. Rep. 644, and note. A sleeping-car company is liable for negligence to its passengers: *Pullman etc. Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873.

**DAMAGES—EVIDENCE OF CAUSE OF ILLNESS, WHEN ADMISSIBLE.**—In an action for damages against a railroad for negligent injury, evidence of nervous prostration and a general weakening of plaintiff's system, the result of the company's negligent act, is admissible: *Chattanooga R. R. Co. v. Liddell*, 86 Ga. 482; 21 Am. St. Rep. 169, and note. Evidence is admissible of sickness of plaintiff's wife, caused by fright, the result of a forcible entry upon plaintiff's close: *Ransom v. Varni*, 81 Cal. 289. An old woman was put off of the train several hundred yards from the station on a cold, rainy night; evidence as to whether such act was the cause of a subsequent illness was admitted: *St. Louis etc. R'y Co. v. Burns*, 71 Tex. 479; *Atlanta etc. R. R. Co. v. Smith*, 81 Ga. 620. Plaintiff fell upon a defective sidewalk. She afterwards had a pain in her left breast, and a cancer developed there. Evidence was admitted as to whether the cancer was the result of the fall or was hereditary: *Trap-*

*nell v. City of Red Oak Junction*, 76 Iowa, 744. But, ordinarily, opinions of non-expert witnesses are inadmissible to prove the cause or permanency of injuries or sickness; *Spaulding v. Bliss*, 83 Mich. 311; *Dean v. State*, 89 Ala. 46.

**DAMAGES—MEASURE OF DAMAGES.**—In estimating damages sustained by a father from an injury to his infant son, the jury may take into consideration the expense of medical attendance, and the father's loss through neglect of his business: *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33; 63 Am. Dec. 586. A case almost "on all fours" with the foregoing, and asserting the contrary doctrine, is *Bridger v. Asheville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653.

## BONNER AND EDDY v. BRYANT.

[79 TEXAS, 540.]

**VOLUNTEER EMPLOYEE CANNOT RECOVER FOR NEGLIGENCE OF HIS FELLOW-SERVANT.**—One who assists the servant of a master, merely as a volunteer, cannot recover from such master for injury received by him through the negligence of such servant. But if, when injured, he was acting in furtherance of his own or of his master's business, he may recover.

**RELEASE BY MINOR INVALID.**—A release by a minor of a cause of action cannot be given effect farther than to compel him to allow for the consideration thereof, in case of a recovery by him.

**ACTION to recover damages.** The opinion states the facts.

*J. J. Dotson, and Gould and Camp*, for the appellants.

*B. D. Dashiell, and Frost and Etheridge*, for the appellee.

**HENRY, A. J.** This suit was brought by appellee to recover damages. His petition charges, in substance, that one Burkett had a contract with appellants to load wood upon their cars at different points along their right of way; that appellee was employed by said Burkett and was his servant; that appellants, with their own servants, were required to furnish and handle the cars for the transportation of the wood; that at the time of plaintiff's injury the piles of wood to be loaded were lying at some distance from each other; that appellants, in order that the wood might be loaded more conveniently, divided their train into sections of one or two cars, placing them opposite to the piles of wood; that as fast as one car or two cars were loaded they were shoved down by hand to the caboose; that plaintiff was requested by the servants of the receivers to assist them in so pushing by hand two of the cars, in order to form the train, and that while he was so doing he was injured by the negligence of appellants' servants.

The petition charged that the assistance so rendered by appellee "was necessary, in order to expedite said Burkett's business."

The defendants filed a general demurrer to the petition, which was overruled by the court. They also pleaded what they call in their brief a special demurrer, but which is in fact a general demurrer argumentatively expressed.

In the case of *Eason v. S. & E. T. Ry Co.*, 65 Tex. 578, 57 Am. Rep. 606, it was said that "where one, having no interest in the loading or unloading of a car, or in the carriage or delivery of passengers or freight, volunteers to assist in reference to such matters, and whilst thus engaged is injured, he stands in the same position as a regular employee engaged in the particular service, so far as any right of recovery for his injuries is concerned. But the case is different when the injured party was acting at the time in furtherance of his own or his master's business."

It is an uncontroverted fact that the plaintiff was injured by the negligence of one of the servants of the defendants whom he was engaged in assisting. Under the rule above announced, he was not entitled to recover if he was assisting to move the cars as a mere volunteer.

If, on the other hand, he was engaged in expediting his master's business, he, if not himself guilty of contributory negligence, had a cause of action if he was injured by the negligence of defendants' servants.

If the petition had been specially excepted to upon the ground that it failed to state in what manner he was expediting the business of his employer, the exception should have been sustained. In the absence of a special exception, the petition was good, because it contained the allegation that his assistance was necessary to expedite his master's business, and there was no error committed in overruling the general demurrer to it.

While the petition was sufficient to authorize proof by plaintiff that he was engaged in expediting the business of his employer, he totally failed to offer such evidence. The record before us shows that he acted as a mere volunteer. The court erred in charging the jury as if there was some evidence before them on that issue. Upon another trial, if the evidence fails to show that plaintiff was, as he alleges, expediting the business of his employer, but shows that he was a mere vol-

untrue, the only proper charge that the court can give will be a direction for a verdict in favor of the defendants.

The plaintiff was a minor when he was injured and when he filed his suit. The defendants pleaded a release by the plaintiff in consideration of their furnishing him with an artificial leg.

The defendants, under proper pleadings, should, if plaintiff recovers, be allowed the value of the artificial limb so furnished, but the release should not, under the circumstances of this case, be given any greater effect than that.

We do not think that the record shows any error in the other particulars complained of.

The judgment is reversed, and the cause is remanded.

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**MASTER AND SERVANT — VOLUNTEERS.** — A person who voluntarily assumes to assist the servants of a railroad company, at their request, in moving a loaded car, without the knowledge or consent of the company, is merely a volunteer, and not a fellow-servant with them, and he cannot recover of the company on account of the negligence or misconduct of such servants: *Rhodes v. Georgia etc. Banking Co.*, 84 Ga. 320; 20 Am. St. Rep. 362, and note.

**INFANTS — RELEASES AND COMPROMISES.** — As to the effect of releases and compromises made and entered into by infants, see note to *Craig v. Van Beller*, 18 Am. St. Rep. 618, 619.

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## OLIPHANT v. MARKHAM.

[79 TEXAS, 542.]

**GENERAL DEMURRER TO ANSWER PROPERLY OVERRULED WHEN.** — Where a general demurrer is interposed to an answer, if any part of the answer presents a valid defense to the suit, either in whole or in part, the demurrer should be overruled.

**DEALINGS IN FUTURES ILLEGAL.** — Dealing in futures is contrary to public policy; and contracts for the future delivery of stocks or produce, in which it is contemplated that the commodity shall not be delivered, will not be enforced.

**TEST OF ILLEGALITY OF CONTRACT.** — The test by which to determine whether or not a demand connected with an illegal contract can be enforced is, whether or not the plaintiff requires any aid from the illegal transaction to establish his case.

**MONEY ADVANCED FOR USE IN BUYING FUTURES, WHEN NOT RECOVERABLE.**

— If a party undertakes to advance to another money to be used in buying futures, and advances it upon such contract, the former, in order to recover the money so advanced, must prove the necessity for making the payments; and in order to do this, he will have to show, not only the request to pay the money, but also the nature of the contract which gave rise to the necessity; and upon such showing he cannot recover.

So, also, if he became interested in the contracts as agent to keep them in force, his participation in the illegal transaction will bar his recovery for the money advanced.

**DURESS CONSISTING IN WITHHOLDING PROPERTY UNLAWFULLY INVALIDATES CONTRACT.** — A contract made in order to regain possession of property unlawfully detained may be avoided on the ground of duress.

**CLERK OR SALESMAN HAS NO POWER TO PAWN HIS EMPLOYER'S ASSETS as security for his own debts.**

**PARTNER CANNOT PLEDGE PARTNERSHIP PROPERTY AS SECURITY FOR HIS PRIVATE DEBTS.**

**ONE WHO BUYS FUTURES FOR ANOTHER, AND ADVANCES MONEY FOR THAT PURPOSE, CANNOT RECOVER IT BACK.**

**DEALINGS IN FUTURES ARE IN THE NATURE OF WAGERING CONTRACTS,** but are not strictly gambling contracts. A wager and a gambling contract are, however, so nearly allied that a jury is not likely to be misled by a charge in which one is used where the other ought to have been used, especially where the meaning was made clear beyond dispute by the previous part of the charge.

**ACTION on a promissory note.** The opinion states the case.

*Abercrombie and Randolph*, for the appellant.

*Campbell and Ball*, and *H. J. Brown*, for the appellee.

**GAINES, A. J.** The plaintiff sued J. S. Markham and Thomas W. Markham upon a promissory note executed by them payable to her. J. S. Markham did not answer, but Thomas W. Markham appeared and pleaded, alleging, first, that the note was given for an illegal consideration, and was therefore void; and in the second place, that it was executed by him under duress.

In support of the first ground of defense, it was alleged that the original consideration of the note was money loaned to and advanced to J. S. Markham by one J. B. Jones, as agent for the plaintiff, under the following circumstances: J. S. Markham had entered into a contract with a firm known as S. S. Floyd & Co., nominally for the sale and delivery of cotton and wheat at stipulated prices at future dates, while in fact it was understood between the parties that nothing was to be delivered under the contract, but that at the time the contracts were nominally to be performed there was to be paid or received by the seller, as the case might be, the difference between the contract price and the market price of the commodity on the day of the performance. It was alleged that Jones well knew of the nature of the contracts, and advanced to J. S. Markham money to pay such margins as became necessary to prevent his rights under them from being forfeited. It was also averred that J. S. Markham, after the

contracts were executed, transferred his interest in them to Jones; that after the transfer Jones paid two or more margins upon them, and that the money so paid was included in the amount for which the note was executed.

The defendant Thomas W. Markham in the second place also alleged that in order to secure the money so advanced and paid for J. S. Markham, the latter delivered to Jones certain evidences of debt, consisting of notes and accounts belonging to T. W. Markham and Son (a firm composed of the defendant T. W. Markham and one F. E. Markham), without authority from the firm or either member thereof; that they demanded the possession of such evidences of debt from Jones, and that he refused to deliver them except upon condition that he, the defendant, would execute a note for the balance claimed to be due from J. S. Markham; that the firm of T. W. Markham and Son were merchants; that the claims were owed to them by their customers, and that their retention by Jones was ruinous to their business; and that the latter having persisted in his refusal to surrender the claims, defendant T. W. Markham executed the note, in order to get possession of them, and for no other consideration.

The plaintiff interposed a general demurrer to the answer, and, the demurrer having been overruled by the court, now assigns that ruling as error. The demurrer being to the pleading as a whole, if any part of the answer presented a valid defense, either in whole or in part, to the suit, it was properly overruled.

The transactions under consideration took place before the passage of the statute which affixed a penalty to the business of dealing in futures: Laws of Nineteenth Legislature, 86; but it was held by this court, in *Floyd v. Patterson*, 72 Tex. 202, 13 Am. St. Rep. 787, that such dealings were contrary to public policy, and that contracts for the future delivery of stocks or produce in which it is contemplated that the commodity should not be delivered would not be enforced. But it does not follow that every contract which is incidentally connected with or grows out of such a transaction is tainted with its vice. In the case referred to, the doctrine was recognized "that the test whether a demand connected with an illegal act can be enforced is, whether the plaintiff requires any aid from the illegal transaction to establish his case."

Applying this principle, it is apparent that in so far as the answer alleges that the consideration of the note sued

upon was for money loaned to the defendant J. S. Markham to pay margins upon future contracts, although with a knowledge on part of Jones of the purpose for which the money was borrowed, it presents no defense to the action. If Jones had sued J. S. Markham for the money so lent, when he had proved the loan he would have established his case, and no proof of the purpose for which the money was lent would have been required. But if Jones had undertaken to advance the margins upon the contracts, and had advanced them, in order to recover the money so expended it would have been necessary to prove the necessity for making the payments, and in order to do this he would have had to show not only the request to pay the money, but also the nature of Markham's contract which gave rise to the necessity. Besides, if Jones acted as Markham's agent in keeping the contract in force, it would seem that such a participation would render him equally as culpable as his principal. If, as the answer alleges, before the contracts between Markham and J. Floyd & Co. were closed Jones became interested in them, it is clear that he could not recover of Markham for his proportion of any loss that may have thereafter accrued.

It follows from what has been said that the answer of Thomas W. Markham sets up, in part at least, a good defense to the action, and that the demurrer was properly overruled. But the demurrer raises a question which it is necessary to decide before making a final determination of the appeal, and it will be discussed here. Does the answer show such a state of facts as entitled Thomas W. Markham to avoid payment of the note, although it may be valid against his co-defendant? Does the fact that Jones unlawfully withheld from him possession of the evidences of debt belonging to his firm, and that he executed the note solely for the purpose of regaining possession of them, authorize a holding that the execution of the note by him was compulsory? It seems to be the settled law in the English courts that the detention or threatened destruction of goods will not constitute such duress as will authorize the rescission of a contract made to regain possession of the property or to prevent its destruction.

But at an early day a contrary ruling was made in this country. In 1797 the supreme court of South Carolina, in the case of *Sasportus v. Jennings*, 1 Bay, 470, held that a contract made in order to obtain possession of goods unlawfully detained could not be enforced. In *Collins v. Westbury*, 2 Bay,



211, 1 Am. Dec. 643, the same court reaffirmed the doctrine. That case involved, as we think, substantially the same principles which are involved in the case now before us. Since that time the doctrine has frequently been applied in numerous decisions in our state courts: *White v. Heylman*, 34 Pa. St. 142; *Hackley v. Headley*, 45 Mich. 569; *Crawford v. Cato*, 22 Ga. 594; *Bennett v. Ford*, 47 Ind. 264; *Foshay v. Ferguson*, 5 Hill, 154; *Spaids v. Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Thurman v. Burt*, 53 Ill. 129; *Nelson v. Suddarth*, 1 Hen. & M. 350. The supreme court of Kentucky seem to have adhered to the English rule: *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445.

The weight of American authority is in favor of the doctrine that detention of goods under certain circumstances may constitute duress, and we think it is in accordance with the better reason. Notwithstanding the doctrine of the English courts, it is well settled by them that money paid in order to get possession of goods unlawfully detained may be recovered back: *Atlee v. Backhouse*, 3 Mees. & W. 650. The two rules recognized by the courts of England, it seems to us, lead to an obvious absurdity; that is to say, that when one pays money in order to obtain possession of his goods when unlawfully detained by another, he may recover it back; but if he gives his note under the same circumstances and for the same purpose, he cannot successfully resist its payment.

In *White v. Heylman*, 34 Pa. St. 142, the supreme court of Pennsylvania say: "If, therefore, such be the case where money has been paid, *a fortiori* is such a defense available in an action upon a promissory note extorted in the manner alleged in the offer made by the defendant and rejected by the court." Certainly, upon principle, the position of a defendant who resists the payment of a note is as favorable as that of a plaintiff who, instead of promising to pay, has actually paid the money and seeks to enforce its recovery. It would seem that where money has been paid to obtain a release of property unlawfully withheld by the defendant, the want of consideration would be a sufficient reason why the action ought to be maintained; and upon the same principle the maker of a note given for a similar purpose ought to be able to defeat an action upon it. The opinion expressed by this court in the case of *McGowen v. Bush*, 17 Tex. 201, though not necessary to the decision of that case, is in accordance with the conclusions to which we have arrived upon the question now under consideration. For the reasons stated, we are

of the opinion that the second defense set up in the special answer presented a good defense to the suit on the note.

There are number of assignments of error based upon the court's charge, but we think that none of them are well taken. The instructions given to the jury by the court very fully and correctly presented the law of the case and of each phase of the case made by the evidence. But we will consider briefly some of the points presented by the assignments.

Paragraphs 2 and 3 of the charge are not inconsistent with each other. They merely presented different phases of the case.

We think there was no error in instructing the jury that J. S. Markham had no power to pledge the notes of T. W. Markham and Son. If he was merely the clerk or salesman and agent of the firm, there could be no plausible pretence that his agency gave him the power to pawn the firm's assets for his own debts. It is not claimed that he had any special authority to do this. Whether the court held or not that there was no evidence tending to show that J. S. Markham was a partner in the firm of T. W. Markham and Son we do not know. If it was held that he was not a partner, we do not see that the holding was erroneous. T. W. Markham testified that he had promised to give him a third interest in the profits to work for the firm, but that there were no profits, and that he quit and went into other business. Subsequently the firm employed him on a salary of fifty dollars per month. This last employment was before he had the transactions with Jones which gave rise to this suit. It is evident from this testimony that he was the mere clerk or agent of the firm when the claims which belonged to the firm were attempted to be pledged. But if it had been shown that he was a partner, we do not see that the result would have been different. A partner's interest in the partnership property is only his proportionate share of what remains after the payment of the partnership debts. He has no such distinct interest in any distinct parcel of the partnership property as enables him to pledge it for his own debts. Such interest in a part of the firm assets is too remote and indeterminate to admit of its being conveyed as security or otherwise.

The charge of the court upon the question of duress was in accordance with the principles we have announced, and was not erroneous. If not sufficiently full, additional instructions should have been requested.

It is assigned that "the court erred in telling the jury 'that if they found that Jones bought futures for Markham and advanced money for that purpose, etc., then this rendered the transaction illegal, and plaintiff could not recover,' for the reason,— 1. That this part of the charge was contrary to law; and 2. Because there were no averments or evidence to authorize such charge or to show that Jones ever bought futures for Markham."

We think that the proposition of law announced in the charge is correct, and that there was both pleading and evidence to sustain it. The only evidence bearing upon the immediate question was that of Jones and J. S. Markham. Jones testified that he did not buy futures for J. S. Markham, and J. S. Markham, upon his examination in chief, testified to the same effect. But upon cross-examination he admitted that some time previous to the trial he had stated, in substance, that Jones acted as his agent in keeping up the contracts, and that what he then said was the more likely to be the truth. This testimony made the charge proper.

There was probably nothing in the testimony which justified the court in telling the jury that if they found "the note sued on was invalid on the ground of being a gambling debt, then they would find for defendant T. W. Markham," but we do not see how it could have prejudiced the appellant. Contracts such as the defendant sought to prove are not strictly gambling contracts, but they are in the nature of wagering agreements, and for that reason it is held contrary to public policy for the courts to enforce them. A wager and a gambling contract are so nearly allied that it is not at all likely that the jury mistook the court's meaning. That meaning was made clear beyond dispute by the previous part of the charge.

The other assignments of error question the sufficiency of the evidence to support the verdict. The evidence was amply sufficient to show that T. W. Markham executed the note solely for the purpose of obtaining possession of the claims of his firm which were unlawfully withheld by Jones, and this entitled him to a verdict.

There is no error in the judgment, and it is affirmed.

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**PLEADING — GENERAL DEMURRER TO ANSWER.** — If any of several grounds of defense set up in an answer is good, it is error to sustain a general demurrer thereto, on the ground that it does not set forth any defense to the action: *Munn v. Taubman*, 1 Kan. 254; 81 Am. Dec. 508.

**CONTRACTS — GAMBLING IN FUTURES.** — As to what contracts are illegal as gambling transactions, or dealings in futures, and the rights of the parties growing therefrom, see *Cashman v. Root*, 89 Cal. 373, *post*, p. 482, and note; *Snoddy v. Bank*, 88 Tenn. 573; 17 Am. St. Rep. 918, and note; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and note 33, 34; *Jackson v. City Nat. Bank*, 125 Ind. 347; *Schmueckle v. Waters*, 125 Ind. 265.

**DURESS — EFFECT OF, UPON CONTRACTS.** — Duress of one's property is a good plea to an action on a bond given to release it: *Collins v. Westbury*, 2 Bay, 211; 1 Am. Dec. 643, and note 644, 645; note to *Hatter v. Greenlee*, 26 Am. Dec. 376-378; *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. Rep. 202, and note. But a seizure of personalty of a wife under a writ against her husband is not duress such as will avoid a receipt given by her to obtain a release of the property: *Kingsbury v. Sargent*, 83 Me. 230.

**PARTNERSHIP.** — One partner has no authority to make use of the partnership property or assets in discharging his own private debts: *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note 377-380.

## FOWLER v. SIMPSON.

[79 TEXAS, 611.]

**HEARSAY EVIDENCE OF PEDIGREE, WHEN ADMISSIBLE.** — The rule which admits hearsay evidence of pedigree is restricted to the declarations of deceased persons who were related by blood or marriage to the person, and were therefore in the succession in question. The testimony of a party suing as heir of his father after his death is competent evidence of his father's declarations touching the land in litigation, and the latter's declaration that he was the surviving brother and only heir of the former owners of the land is admissible in evidence.

**SERVICE OF PROCESS BY PUBLICATION, RECITAL OF DUE SERVICE IN JUDGMENT BY DEFAULT UPON, WHEN NOT CONCLUSIVE.** — When the recitals in a judgment by default, rendered upon service of process by publication, show conclusively that the process was never lawfully served, the judgment is a nullity, the court being without jurisdiction, although such judgment recites due service.

**ATTORNEY BY TENANT INVALID WHEN.** — A person who is in possession of land as tenant of another cannot, without surrendering possession or giving notice to his landlord, by agreeing to become the tenant of a stranger not deriving title from the same source with that of the original landlord, transfer to such stranger the possession. Nor does it make any difference that the land had descended to the heirs of the original landlord, and that the tenant did not know who such heirs were.

**TAX DEED DOES NOT PASS TITLE WHEN.** — A tax deed which is not executed with the prerequisites of the law authorizing its execution does not pass any title; but a deed for the property, sufficiently describing it, properly acknowledged and recorded, without the existence of any authority upon the part of the tax collector, may become the basis for the acquisition of a title under the five years' statute of limitations.

**ACTION to recover land.** The opinion states the case.

*Foard, Thompson, and Townsend, for Simpson.*

*Addins and Green, for appellants Fowler and Haynes.*

HENRY, A. J. This was an action of trespass to try title.

The tract of land in controversy is composed of two contiguous surveys, of 640 acres each, patented to Samuel Fowler.

The defendants pleaded not guilty and the statute of limitations of five years.

The cause was tried without a jury, and judgment was rendered for the plaintiffs for an undivided one-half interest in the land. Both parties perfected appeals and assign errors.

The court filed the following conclusions of fact: "The court finds that the two tracts, of 640 acres each, were granted to one Samuel Fowler in July, 1841; that Samuel Fowler died in 1862, leaving as his sole heirs James Burton Fowler and John Fowler, two brothers of the said Samuel, and that John Fowler died in 1881, leaving as his sole heir at law his brother James Burton, who conveyed the land in controversy to the plaintiffs herein by deed dated May 28, 1889, and that this suit was instituted by them on the seventh day of September, 1889.

"2. Also, that John Fowler was in possession of the land by his agent, one Kinchler, at the time of his death; that Kinchler resided on the land by virtue of and under a written contract, dated August 15, 1879, in which he was to hold possession until the first day of January, 1884, as the agent or tenant of said John Fowler, and that in 1881 the said Kinchler, while still in the possession of the land, agreed to hold the same as the tenant of defendant, Simpson, and afterwards, on the tenth day of March, 1884, executed and delivered to defendant, Simpson, a written instrument or acknowledgment of his tenancy, and that his wife now holds possession of the land as tenant, under said agreement and by virtue thereof.

"3. Also, that the defendant, Simpson, purchased the 1,280 acres at a tax sale made by Toliver, who was the state and county collector of taxes, by deeds dated in 1878 and 1879, and that the description of the land in said deeds was amended in a deed dated October 20, 1879, which deeds convey to Simpson the interest of John Fowler.

"4. Also, that Simpson recovered a judgment in the district court of Colorado County, at its March term, in 1884, in a suit brought by him against the heirs of the said John Fowler; that the judgment recited that the defendants were duly

cited, but made default; that although the judgment contains that recital, the citation on file shows that the citation was only published for four consecutive weeks, and the affidavit on file only states that the residence of the heirs is unknown. The judgment is dated in March, 1884.

"5. Also, that defendant, Simpson, has paid the state and county taxes on the 1,280 acres each year since and including the year 1879 to the present date."

The defendant, Simpson, as appellant, assigns as error a ruling of the court in permitting John J. Fowler, one of the plaintiffs, to testify to the declaration of his father, James Burton Fowler, that he was the surviving brother and only heir of Sam and John Fowler, made before he had conveyed the land to plaintiffs.

It is contended that the "declarations of James Burton Fowler, made at the time he claimed to own the lands, were not competent evidence." James Burton Fowler was dead when the testimony was given.

With regard to the admission of hearsay evidence in cases of pedigree, Mr. Greenleaf says that the law resorts to it "upon the ground of the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. . . . The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore in the succession in question." The evidence was proper.

The court's conclusions of law embraced the following: "Under the judgment the court holds that defendant, Simpson, acquired the entire interest of John Fowler, deceased, in the two tracts, which was an undivided interest of one half thereof in each tract. The court holds that the recitals in the judgment cured the defect in the citation and service, as decided by our supreme court in *Treadway v. Eastburn*, 57 Tex. 209."

Also, that defendant had established his title under his plea of limitation to an undivided one-half interest in the two tracts.

In the above referred to case of *Treadway v. Eastburn*, 57 Tex. 209, it was proposed to collaterally attack a judgment of a district court of this state, rendered upon service by publication of the citation, on the ground of want of jurisdiction

of the court to render the judgment because the citation was not published for the time required by the law.

The opinion in that case shows that the writ of citation then in question was in the usual form, and was dated July 24, 1866, and that the return of the sheriff thereon was as follows: "Came to hand July 30, 1866, and executed by publishing in the *Paris Press*, a newspaper published in the county of Lamar, state of Texas, for successive four weeks previous to return day, this the twenty-fifth day of July, 1866." The opinion quotes the following recital from the final judgment: "This day came the plaintiff by his attorney, and the said defendant, Edward Eastburn, failed to appear and answer, but wholly made default, although duly served with process."

The opinion, in stating the law of the case, says: "If the uncontradicted recitals in the record show affirmatively that the court did not have jurisdiction over the subject-matter, or that the jurisdiction over the person did not attach, then a presumption to the contrary will not be indulged. Otherwise the presumption in favor of the jurisdiction of the court would prevail in every case, and the mere rendition of the judgment would of itself import absolute verity. To thus hold in cases where the record shows affirmatively want of jurisdiction would itself impeach the record, and thus violate the very rule sought to be invoked, that the record cannot, in a collateral proceeding, be contradicted. To determine, however, whether the record shows affirmatively that there has been proper service, the whole of it should be taken together. When thus considered, if that portion which relates to this question shows affirmatively such character of service as is not authorized by law, or such defective service that a judgment by default rendered thereon would be void, and not voidable only, and the remainder of the record is silent upon this subject, not showing any finding of the court from which it may be inferred that there was other service or an appearance, then this would be a case in which it affirmatively appears that the jurisdiction of the court had not attached. If, however, other parts of the record, and particularly the judgment, which is the final act of the court, entered upon full examination and consideration, of all the necessary facts, should, as in the case now before us, recite the due service of process or other facts which would give the court jurisdiction of the person, then this would be a case in which it would affirma-

tively appear that the jurisdiction had in fact attached, and the general rule would apply that in a collateral proceeding this recital in the record imports absolute verity."

The record preceding the final judgment in the case of Simpson against the unknown heirs of John Fowler, as introduced in evidence on the trial of this cause, among others, shows the following facts: On the first day of August, 1883, the plaintiff filed his original petition, and on the same day made affidavit "that the residence of the defendants" was unknown to him. Citation for publication was issued on the same day.

The law then in force required the affidavit to state "that the names of such heirs are unknown to the affiant," and that the citation should be published "once in each week for eight successive weeks previous to the return day of such citation": R. S., art. 1236.

The return of the officer showed that the writ came to his hands on the day that it was issued, and that it was executed by being published "once in each week for four consecutive weeks previous to return day hereof, the first publication being made on the second day of August, 1883, the second on the ninth day of August, 1883, the third on the sixteenth day of August, 1883, the fourth on the twenty-third day of August, 1883." The officer's return of the citation bore the date "the twenty-ninth day of August, 1883."

The judgment was rendered on the eighteenth day of March, 1884, and, among others, contained the following recitals: "Plaintiff appeared by attorney, and the defendants, though duly cited by publication according to law, which citation was returned into this court prior to the September term, A. D. 1883, came not, but made default. . . . Plaintiff introduced the citation by publication with the return thereon executed according to law, and returned on the 29th of August, 1883."

In the case of *Treadway v. Eastburn*, 57 Tex. 214, it is further said, quoting from *Hahn v. Kelly*, 84 Cal. 408, 94 Am. Dec. 742: "If the affidavit of the printer states that the summons was published one month, and yet the court in its judgment states that it was published three, or that service had been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."



Herein lies, we think, a material distinction between the judgment in the *Treadway v. Eastburn* case and the one in *Simpson v. Fowler*. In the former, the judgment entry itself contained no recital showing on what evidence its conclusion of lawful service of the writ was predicated, and in the absence in the judgment itself of any evidence on the subject, a conclusive presumption was indulged in favor of the integrity of the judgment. "But such a presumption can be indulged only in the absence of proof, and not against proof": *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643.

The judgment now in question identifies, by referring to its date, the return of the officer and the writ upon which the court's conclusion of lawful service of process was based. Instead of relying upon a presumption, it points out the proof upon which its validity depends. It would be doing violence to the recitals of the judgment itself to doubt upon what evidence of the service of its process the court was acting.

The language of the judgment allows of no escape from the conclusion that the process was never lawfully served; wherefore the court was without jurisdiction, and its judgment was a nullity.

While the case made by the defendant, Simpson, was in all other respects sufficient to give him title under the five years' statute of limitations to at least as much of the land as the judgment awarded him, we are yet of the opinion that the method by which he attempted to acquire the actual possession of the land cannot be held to have had the intended effect.

Kinchler was in possession of the land as the tenant of John Fowler. Without either surrendering the possession or notice to his landlord, he agreed to become the tenant of Simpson and to hold the land for him.

In the case of *Longfellow v. Longfellow*, 54 Me. 248, it is said: "The relation of landlord and tenant once established, the defendant, so long as that relation subsists, cannot be suffered to allege title in himself or in any person other than him for whom he holds. He may show that the plaintiff's interest was but temporary, and that it has expired, or that he has conveyed it away subsequent to the demise to some third person under whom defendant has commenced a fresh holding, or that the tenancy has been determined, and that subsequently to the determination he has ceased to occupy the premises."

In *Fuller v. Sweet*, 80 Mich. 241, 18 Am. Rep. 122, the same doctrine is announced, as follows: "It is very well settled that where a tenant is in under one title no attornment is valid which is made to any one not in privity with that title. The same principle invoked by plaintiffs to estop the defendant from denying the title under which he was possessed will prevent him from changing possession by any acknowledgment to a stranger not deriving title from the same source with that of the original landlord, and that derivative title must be shown, in order to validate the attornment and save the tenant and all claiming through him during the tenancy from liability to the first landlord."

This court said in the case of *Flanagan v. Pearson*, 61 Tex. 805: "It is urged that after the expiration of his term of lease, . . . the relation of landlord and tenant thus being terminated, the tenant might disclaim his landlord's title, retain possession, and attorn to Flanagan. We do not think that position maintainable."

And in the case of *Juneman v. Franklin*, 67 Tex. 415, it was said by this court: "If Juneman wished to attorn to another and place himself in a position to dispute his landlord's title, it was his duty to first restore the latter to possession, and place him in the same position as he was before the entry under the lease was made. He should have given up the advantage he derived from the tenancy by being let into possession, in order to remove the estoppel to which he was subjected."

It can make no difference in the application of the rule that the landlord, John Fowler, died, and the title had descended to his heirs. It is the title under which he entered that the estoppel upon the tenant relates to, and not the individual ownership of the title. Nor did the fact that the heirs to whom the title had descended were unknown to him confer upon the tenant the right to attorn to a stranger. He should have either surrendered the possession or have held it until the appearance of the representative of the title under which he entered. If Simpson had by any means acquired the Fowler title, it would have been different. He did not show title through his tax deeds or otherwise. A distinction must be recognized between a title to the property acquired under a tax sale, which may be done when the proper proceedings are taken, and simply a deed for the property made by a tax collector.

The former will exist when the methods of procedure directed by the law are shown to have been faithfully observed. A deed for the property, sufficiently describing it, properly acknowledged and recorded, without the existence of any authority upon the part of the tax collector, may become the basis for the acquisition of a title under the five years' statute of limitations.

The judgment will be reversed, and here rendered in favor of the appellants, who were plaintiffs in the district court.

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**HEARSAY EVIDENCE OF PEDIGREE.** — The admission of hearsay to prove the pedigree of a person is restricted to the declarations of deceased persons who were related to him by blood or marriage: *Haddock v. Boston etc. R. R. Co.*, 3 Allen, 298; 81 Am. Dec. 656, and note.

**PROCESS — RECITALS OF SERVICE.** — A recital in a judgment of due service is not conclusive when the proof of service is part of the judgment roll, and as it appears in such roll, is not sufficient evidence of such service: *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52, and particularly note; *Laney v. Garbee*, 105 Mo. 355; *Laney v. Sweeney*, 105 Mo. 360.

**LANDLORD AND TENANT — ATTORNEY.** — A tenant's attornment to a stranger is void unless with the landlord's consent, or in consequence of a judgment, order, or decree of court: *Fowler v. Cravens*, 3 J. J. Marsh. 428; 20 Am. Dec. 153; *Chambers v. Pleak*, 6 Dana, 426; 32 Am. Dec. 78; *Blanchard v. Tyler*, 12 Mich. 339; 86 Am. Dec. 57.

**TAX DEEDS, RECITALS IN, MUST SHOW WHAT, IN ORDER TO PASS TITLE:** See note to *Jackson v. Shepard*, 17 Am. Dec. 511, 512.

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## GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. BRENTFORD.

[79 TEXAS, 619.]

**PROMISE OF MASTER TO REPAIR DEFECTIVE MACHINERY DOES NOT RELIEVE SERVANT FROM RESULT OF HIS CONTRIBUTORY NEGLIGENCE.** — The mere promise of a master to repair a defective machine or implement used in his business, and known by both to be dangerous, will not relieve the servant from the ordinary result of his own contributory negligence; and if, with knowledge that such promise has not been performed by the master, after a sufficient time has elapsed for such performance, the servant continues in the service and is injured, he cannot recover.

**SERVANT JUSTIFIED IN RELYING ON MASTER'S PROMISE TO REPAIR DEFECT IN MACHINERY WHEN.** — When a master promises to repair a defect in machinery used in his business, and requests his servant to go on with the work, the latter has a right to believe that the defect will be repaired before he will be again called upon to place himself in danger from it; and if, in ignorance of the continued existence of the defect, he is subsequently injured, the master cannot be heard to say that the servant ought not to have relied on his promise.

**INSTRUCTION ASSUMING FACT NOT PROVEN IS ERRONEOUS.** — In an action against a railway company to recover damages for personal injuries, a charge to the jury assuming that a person not shown to be the representative of the company would bind it by his promise to remedy the extinction of an electric light not furnished nor controlled by the company, is erroneous. Nor, under such circumstances, should the jury be instructed that his negligence was the negligence of the company, or his promise its promise.

**MASTER LIABLE FOR HIS AFFIRMATIVE ACTS FROM WHICH INJURY DIRECTLY RESULTS TO HIS SERVANT.** — A master is liable for his own or his representative's affirmative acts from which injury to his servant directly results, although the servant knew that he had done such acts before, and still continued in his service. If, therefore, the representative of a railway company, whose duty it is to refrain from doing any act that will imperil its servants' safety while engaged in doing certain work, does an act which prevents them from hearing and having the benefit of signals known to be necessary to the safe performance of the work, the company will be liable for such representative's act, if it was the cause of injury to the servants, and within the scope of the powers conferred upon him, although the servants may have known that he had done the same or similar acts before that time.

**ACTION for personal injuries.** The opinion states the case.

*J. W. Terry*, for the appellant.

*W. B. Denson*, for the appellee.

**STAYTON, C. J.** Appellee brought this action to recover damages for an injury received by him while in the employment of appellant.

With others, on the night of November 5, 1889, appellee was engaged in loading a flat-car with railroad iron, each bar of which weighed as much as six hundred pounds. The iron as brought from a ship by its servants was received from their hands by the employees of appellant, eight in number, who would immediately, and without laying it down, carry it to the car on which it was to be placed, when at a signal to be given by one of them who was agreed upon, all were expected to throw the rail on the car.

The manner in which the operation was performed is thus stated by a witness: "It is customary to give the signal by the leader calling out the word 'heave' when he went to throw the iron, and all the men would throw at once. The different signals were 'take iron,' 'raise breast high,' and the third was 'heave.'"

The case which plaintiff's evidence tends to make is, that while the men were engaged in loading iron, an electric light near by went out and left them with insufficient light, though

there were other lights near by; that after this light went out, one of the men engaged in loading the iron called to a man by the name of Patrick, telling him that the light was out, and some one would get hurt, and that in reply to this Patrick told them to proceed with their work and he would have the light renewed; that they continued to load iron after the light went out, and were in the act of throwing a bar of iron on the car when, not hearing the command to "heave," the men at the end of the bar where plaintiff was failed to do so, which caused the bar to fall on plaintiff's foot and seriously injure it.

It was claimed that if the light had been there, the men could have seen the motions of their fellows, and would not have been compelled to govern their actions by the signal alone. It was further claimed that one Whitney, who was the representative of appellant, was very noisy, in fact so much so as to prevent those engaged in loading iron from hearing the signals.

It was shown that Whitney was the representative of the company for whose negligence in the performance of his duties as such representative appellant would be liable; but Patrick is not shown to have been vested with any representative character other than that of an overseer or boss whose duty it was to superintend the loading of iron.

Plaintiff testified that "about ten minutes before I was hurt, the electric light under the shed where we were working went out. A few minutes after it went out, Andrew Blackburn, one of the crowd with whom I was working, called out to Patrick, who had charge of the lights, and said we did not have enough light, and that if we continued to work there without the light, some one would get hurt. Patrick said to Blackburn, 'Go ahead, and I will fix the light.' I knew it was dangerous to handle the iron without a good light, but Patrick, who was Mr. Whitney's head man over us, promised to fix the light, and I expected that he would do so, until I was hurt."

Another witness stated: "We knew it was dangerous to load iron without a better light, but did not want to quit work."

The evidence shows that neither appellant nor its employees had any control of the electric light, but that this was owned and controlled by the electric light company, who furnished the light which went out, and others, to the steamship company.

Appellant, however, had one dozen railway lamps, some of which were in use when the accident occurred, and these were lighted by Patrick before the accident.

The evidence for defendant tends to rebut all the material facts testified to by witnesses for plaintiff, except the fact of his injury,—tends to show that the light did not go out; that there was other sufficient light; that Patrick made no promise to restore the light; and that Whitney made no noise and was not present when the accident occurred.

Many questions are raised on the rulings of the court overruling exceptions to the petition, and on the ruling of the court in refusing a new trial, but most of these may be considered under an assignment which questions the correctness of a charge given by the court.

That charge was as follows: "If you believe from the evidence that the going out of the electric light was the cause of the plaintiff's injury, and that it was unsafe to handle the railroad iron after the light went out, and that the defendant's boss of plaintiff was informed that the light was out, and promised to attend to restoring the necessary light, and that the plaintiff continued to work by reason of the boss's promise to remedy the defect in the light, and that the boss did not in a reasonable time restore the light, and that the boss was guilty of negligence in not remedying the defect of light, and that such negligence was the cause of plaintiff's injuries, then the plaintiff would be entitled to recover of defendant for damages for such injury."

This charge assumes that the promise of the person termed a "boss" to renew the light would fix liability on the railway company, if a failure to renew it would constitute negligence, without reference to the contributory negligence of appellee.

We do not understand that it has ever been held that the promise of a master to repair a defective machine or implement used in his business, and known by both to be dangerous, will relieve the servant from the ordinary result of contributory negligence on his own part, though cases may be found in which stress was laid on the fact that such a promise was made.

If both have knowledge of such a defect, and the master request the servant to continue in the service, the latter is authorized to believe that the former will repair the defect, because it is his duty to do so; but if, with a knowledge that this has not been done, after a sufficient time has elapsed to

do it, the servant continues in the service, we see no reason why the ordinary rule should not apply.

It has been said that the master's promise to repair the known defect removes the presumption that the servant assumed the risk resulting from the defect; but we may ask, How long does it remove that presumption? May the servant rely upon the promise when he sees that it has been violated, and perform the dangerous act when he knows that the defect has not been repaired?

Under such a promise, and request to go on with the work, the servant, doubtless, is given ground to believe that a defect will be repaired before he will again be called upon to place himself in danger from it; and the fact that he may be subsequently injured through the defect ought not to defeat his right to recover, if he was ignorant of the continued existence of the defect at the time the injury occurred.

In such a case, the master ought not to be heard to say that the servant ought not to have relied on his promise.

It would be difficult to find a principle on which to base a rule relieving a servant from obligation to use proper care for his own safety, because the master had promised to repair a known defect which exposed him to danger, and had requested him to remain in a service known to be dangerous. It cannot be placed logically on the unequal situation of master and servant, in a country in which all men are free to serve or not to serve any particular employer.

If it be placed on the ground that the promise to repair and request to continue in the service rebut the ordinary presumption that the servant assumes the known risk incident to the given employment, it will be difficult to maintain it in a case in which the servant continues in the service with a knowledge that the defect has not been repaired, and that he is in constant danger from the use of the defective thing.

If it be placed on the broad but very indefinite ground that justice and policy require such a rule, it will be difficult to give a reason why the same rule should not exist in all cases in which injuries result from the use of defective appliances or implements known by employer and employee to be defective and their use dangerous; for the law implies an undertaking on the part of the employer to furnish reasonably safe machinery, implements, and appliances, and to repair them when out of order; and it implies a request to continue in the

service and to use them until notified that this is no longer desired, unless the employment is for a definite period.

When there is no express promise to repair or request to continue in the service, the employee assumes the risks incident to a service conducted with machinery, implements, or appliances known by himself as well as the employer to be defective and dangerous.

This being true, it is difficult to perceive that there should be a difference, on grounds of policy or justice, between the liability of the employer based on an implied promise or obligation and request, and that based upon an express promise to repair and request to continue in the service, in any case in which the employee knows that the defect has not been repaired, but continues to use the defective thing or to work without something known to him to be necessary to his safety.

Cases may arise in which, through contract, an employer may become liable to an employee who is injured while in his service under circumstances that would defeat all claim under the ordinary rules applicable to master and servant.

The charge in question left out of view altogether any consideration of the question whether the plaintiff exercised that degree of care which the law required of him, and made the case to turn on the promise of the "boss" and his failure to use proper care.

In such cases the question of contributory negligence or no must be left to the jury: *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Clark v. Holmes*, 7 Hurl. & N. 942; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 261; 14 Am. Rep. 598; *Patterson v. Pittsburg etc. R. R. Co.*, 76 Pa. St. 394; 18 Am. Rep. 412; *Conroy v. Vulcan I. Works*, 62 Mo. 36; *Keegan v. Kavanaugh*, 62 Mo. 233; *Hough v. Railway Co.*, 100 U. S. 214.

The charge assumed that Patrick was the representative of the company in reference to the matter of lights, and that his promise and negligence in this respect was, in effect, the promise and negligence of his employer.

It is evident that neither Patrick nor the railway company had any control over the electric lights, which were rented by the steamship company, and it is not shown that the company placed Patrick at the wharf to provide lights.

It appears that defendant furnished twelve railroad lights to be used about the place where the men were working, and that Patrick had lighted ten of these and put them on a



table, from which any employee needing a light could take it, and some of these seem to have been used to light the place of loading.

Whitney was shown to be the representative of the railway company in control of the work going on that night; and that Patrick was clothed with any other power than to oversee the loading of the train is not shown; and under this state of facts we are of opinion that the court should not, in effect, have instructed the jury that the negligence of Patrick was the negligence of the railway company, or his promise its promise.

If he was simply a fellow-servant of those engaged in loading iron, neither his promise nor negligence could fix liability on the company; but if he was charged by his employer with the duty of furnishing lights, his negligence in this respect would be the negligence of his employer, and those engaged in the work might rely upon his promises as fully as could they upon those of any representative of the railway company.

The charge of the court assumed his representative capacity, and under the evidence we believe it was not authorized to do so: *McGowan v. St. Louis etc. R. R. Co.*, 61 Mo. 532; *Wharton on Negligence*, 220; *Galveston etc. R. R. Co. v. Farmer*, 78 Tex. 85; *Robinson v. H. & T. Cent. R'y Co.*, 46 Tex. 540.

Whether the railway company was negligent in failing to furnish other light when the electric light ceased was a matter proper to be submitted to the jury, under all the facts of the case, but whether this was so should not have been tested solely by the action of Patrick or his failure to act.

The court gave the following charge: "If you believe from the evidence that the defendant's agent, Whitney, made such unnecessary noise that thereby the plaintiff could not hear the proper signals, and that the defendant's agent was guilty of negligence in making the noise, and that such noise was the cause of plaintiff's injuries, then the plaintiff would be entitled to recover his damages for his injuries."

It is urged that this charge should not have been given without the qualification that contributory negligence of plaintiff would defeat his right of recovery; and this proposition is based on the fact that plaintiff's evidence tended to show that Whitney had been boisterous all the evening, using loud and profane language to urge the employees forward with the work, which prevented their hearing signals.

When a servant remains in an employment known to be dangerous because of defective machinery, implements, or appliances not sufficient for the safe conduct of the business, he is said to assume the risks incident to the business thus conducted, and to be guilty of contributory negligence if an injury occurs to him through their use. But does the same result follow when the injury results from some affirmative act of the master or his representative, even when the servant knew that the master or his representative had done the same thing frequently before the time of the injury?

When the cause of the injury is the direct act of the master or his representative, it cannot be said that the servant remaining in the employment is the proximate cause of the injury, even though the servant may have known that the master or his representative had frequently done the same or similar acts which imperiled his safety; for the act which, in such case, causes the injury is the wrongful act of the master or of his representative, the result of the exercise of the will of the one or the other, and hence the proximate cause of the effect, from which the master ought not to be permitted to go free from liability on the ground that the servant knew he had, before the happening of the injury, done acts such as that from which the injury resulted, but still remained in his service.

The master's failure to furnish what is necessary to the conduct of his business with reasonable safety to his servants, and their continuance in his service with a knowledge of such fact, may defeat the right of the servant to recover for an injury resulting from such a cause; but this rule cannot be invoked to shield the master from liability for his own or his representative's affirmative acts, from which injury to his servant directly results.

This is but the application of the rule that contributory negligence does not bar an action for willful wrong, which, as here used, means an intentional act through which injury results, though no purpose or desire to do the injury may have existed.

If Whitney was the representative of the company, whose duty it was not to do any act that would imperil its servants' safety while engaged in loading the iron, then if, at the time of the injury, he did any act which prevented them from hearing and having the benefit of signals known to be

necessary to the safe performance of the work, we are not prepared to hold that this would not fix liability on the company, if his act was the cause of the injury, and within the scope of the powers conferred upon him, although the servant may have known that he had done the same or similar acts before that time.

For the error before noticed, the judgment will be reversed, and the cause remanded.

PROMISE OF MASTER TO REPAIR DEFECTIVE MACHINERY, EFFECT OF, UPON SERVANT'S RIGHT TO RECOVER FOR INJURY RECEIVED BY HIM BY REASON OF FAILURE TO PERFORM SUCH PROMISE. — If a servant gives notice to his master of a defect in machinery or appliances which he is required to use, and the master promises to remedy the defect within a reasonable time, the master will be liable for injuries resulting to the servant from such defect, and the servant will not be chargeable with contributory negligence in continuing in the service for such reasonable time, unless the danger is so great that a man of ordinary prudence would not remain in the service under the circumstances: 1 Shearman and Redfield on Negligence, 4th ed., sec. 215; Cooley on Torts, 559; Beach on Contributory Negligence, sec. 140; 2 Thompson on Negligence, 1009; Wood on Master and Servant, sec. 378; Wharton on Negligence, sec. 220; Deering on Negligence, sec. 201; Saunders on Negligence, 127; Moak's Underhill on Torts, 61; *Hough v. Railway Co.*, 100 U. S. 213; *Parody v. Chicago etc. R'y Co.*, 15 Fed. Rep. 205; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; 47 Am. Rep. 425; *Belair v. Chicago etc. R'y Co.*, 43 Iowa, 662; *Greene v. Minneapolis etc. R'y Co.*, 31 Minn. 248; 47 Am. Rep. 785; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; 48 Am. Rep. 669; *Patterson v. Pittsburgh etc. R. R. Co.*, 76 Pa. St. 389; 18 Am. Rep. 412; *Gulf etc. R'y Co. v. Donnelly*, 70 Tex. 371; 8 Am. St. Rep. 608; *Brabbs v. Chicago etc. R'y Co.*, 38 Wis. 269; *Stephenson v. Duncan*, 73 Wis. 494; 9 Am. St. Rep. 806; *Holmes v. Clarke*, 6 Hurl. & N. 849; *Clarke v. Holmes*, 7 Hurl. & N. 987. In delivering the opinion of the court in *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425, Scott, J., said: "It is now uniformly stated by text-writers that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time, to permit the performance of a promise in that regard, without being guilty of negligence; and if any injury results therefrom, he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service." And Somerville, J., delivering the opinion of the court in *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, said: "Where, however, the employee or servant, electing not to abandon his employment, gives notice to the employer of such defect in the appliances or instrumentalities used by him, and the employer promises to remedy the defect, the relationship of the contracting parties at once undergoes a change. The assurances of the employer that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a reasonable time. It obviates the objection that the com-

tinuance of the servant in the service was an implied engagement by him to assume such risks, pursuant to the original presumption upon his entering the service."

The doctrine above stated is not confined in its application to cases where the servant, although aware of the defect, is ignorant of the risks, nor to cases where, in reliance upon the promise, he continues in the service, supposing that the defect had been already remedied; *Greene v. Minneapolis etc. R'y Co.*, 31 Minn. 248; 47 Am. Rep. 785.

**SERVANT NOT CHARGEABLE WITH NEGLIGENCE, AS MATTER OF LAW, IN CONTINUING IN SERVICE AFTER PROMISE BY MASTER TO REPAIR.** — A servant is not chargeable with contributory negligence, as matter of law, in continuing to use a machine or appliance which he knows to be defective and dangerous, where he has complained of the defect, and the master has promised to remedy it. It is for the jury to determine, in such a case, whether or not the servant was guilty of contributory negligence, and the burden of proving that he was guilty of such negligence is upon the master: 2 Thompson on Negligence, 1009; *Moak's Underhill on Torts*, 61; *Hough v. R'y Co.*, 100 U. S. 213; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; 47 Am. Rep. 425; *Greene v. Minneapolis etc. R'y Co.*, 31 Minn. 248; 47 Am. Rep. 785; *Hawley v. Northern C. R'y Co.*, 82 N. Y. 370; *Daley v. Schaaf*, 28 Hun, 314; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; 48 Am. Rep. 669; *contra, Webber v. Piper*, 38 Hun, 353. Mitchell, J., in delivering the opinion of the court in *Greene v. Minneapolis etc. R'y Co.*, 31 Minn. 248, 47 Am. Rep. 785, said: "If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has, in law or natural justice, to insist that it shall be done at the risk of the servant, and not his own, when, notwithstanding the servant's objection to the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it." And Pollock, C. B., in *Holmes v. Clarke*, 6 Hurl. & N. 349, said: "It must be considered that the master takes upon himself the responsibility of any accident that may occur during that period."

**PROMISE OF MASTER TO REPAIR REBUTS PRESUMPTION OF SERVANT'S ASSUMPTION OF RISK.** — If a master promises to remedy a defect in machinery or appliances which his servant is required to use, his promise rebuts the presumption that the servant, by continuing in the employment, engages to assume its risks: *Cooley on Torts*, 559; *Wood on Master and Servant*, sec. 380; *Hough v. R'y Co.*, 100 U. S. 213; *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152.

**MERE COMPLAINT BY SERVANT, WITHOUT PROMISE BY MASTER, DOES NOT JUSTIFY CONTINUANCE IN SERVICE.** — A mere complaint made by a servant to his master of a defect in machinery which the servant is required to use, unless the master promises to repair it, will not justify the servant in continuing to expose himself to the danger: *Beach on Contributory Negligence*, sec. 140; 2 Thompson on Negligence, 1009; *Wood on Master and Servant*, sec. 379; *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Greenleaf v. Illinois Central R. R. Co.*, 29 Iowa, 14; 4 Am. Rep. 181; *G. v. H. & S. A. R'y Co. v. Drew*, 59 Tex. 10; 46 Am. Rep. 261; *Texas & P. R'y Co. v. Bradford*, 66 Tex. 732; 59 Am. Rep. 639. But see *Thorpe v. Missouri Pac. R'y Co.*, 89 Mo. 650; 58 Am. Rep. 120. There are some cases which seem to hold that where a servant, knowing of a defect in machinery, complains of it to the master, but continues in the use of it in the reasonable expectation of its being repaired, he will not be precluded from recovering for

an injury resulting from such defect: Wharton on Negligence, sec. 221; *Holmes v. Worthington*, 2 Fost. & F. 533; *Conroy v. Vulcan Iron Works*, 62 Mo. 35. But the great weight of authority holds that a promise by the master to repair the defect, either express or implied, must be shown, in order to justify a recovery by the servant.

**SERVANT CONTINUING IN SERVICE AFTER FAILURE OF MASTER TO PERFORM PROMISE CANNOT RECOVER.** — It seems to be settled by the weight of authority that if a servant, whose master has promised to repair defects in machinery used by him within a reasonable time, continues in the service after such reasonable time has elapsed, knowing that the master has failed to keep his promise so made, the servant by so continuing in the service will be deemed to have assumed the additional risk, and cannot recover for injury happening to him after he becomes aware of the master's failure to perform his promise: 2 Thompson on Negligence, 1010; Wharton on Negligence, sec. 220; *Eureka Co. v. Bass*, 81 Ala. 200; 60 Am. Rep. 152; *Indianapolis etc. Ry Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; *Counsell v. Hall*, 145 Mass. 468; *Crutchfield v. Richmond & D. R. R. Co.*, 78 N. C. 300; *Stephenson v. Duncan*, 73 Wis. 404; 9 Am. St. Rep. 806. Thompson says: "If, after the expiration of such reasonable length of time, the servant sees that the defect complained of has not been remedied, and he nevertheless continues in the service, he is deemed to accept the risks of the danger, and the master's liability ceases": 2 Thompson on Negligence, 1010. And Somerville, J., in delivering the opinion of the court in *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, said: "We have said that the carrying of the risk by the employer will be implied to continue only for a reasonable time after the making of the promise by him to remove the danger producing it. The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can no longer therefore rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances; for a servant or employee to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer. The risk therefore again becomes his own; and his conduct, as we have said, although not necessarily or *per se* negligent, may or may not become negligent, according to the circumstances of the particular case." In *Belair v. Chicago etc. Ry Co.*, 43 Iowa, 662, it was held that what is reasonable time depends upon the circumstances of each particular case. Judge Cooley, however, says, and his language is cited with approval by Mr. Justice Harlan in *Hough v. Railway Co.*, 100 U. S. 213, that "the master is not in the exercise of ordinary care unless or until he makes his assurances good": Cooley on Torts, 559. And Shearman and Redfield say: "Where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would

be reasonably allowed for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept": 1 Shearman and Redfield on Negligence, 4th ed., sec. 215. Wood goes still further, saying that "the promise to repair removes the *prima facie* burden from the servant of establishing due care on his own part, and imposes it upon the master, and this is the case, however long the servant thereafter continues in the service, even though the master fails to repair." We have, however, not been able to find any decided cases in which this doctrine has been applied.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**PERELES v. MAGOON.**

[78 WISCONSIN, 27.]

**SURVEYING.** — AN EXCESS OR DEFICIENCY in the length of a block of land which is, according to a plat thereof, divided into a number of lots, should be apportioned among the several lots in proportion to their respective frontages as indicated by the plat.

**EJECTMENT** to recover a strip of land one foot wide, in block 68, in Milwaukee. The block, on the original plat thereof, was designated as having a frontage of 674.6 feet on Jefferson Street, and 696.6 feet on Milwaukee Street, whereas, by actual measurement, it had a frontage of 678.08 feet on the former and 700.6 feet on the latter street. The block was, on the plat, divided into twenty-three lots, of which Nos. 1 to 11 fronted on Jefferson Street, and Nos. 12 to 23 on Milwaukee Street. These lots were declared on the plat to be 60 feet wide, except lot 1, which was 76 feet at one end and 86.5 feet at the other, and lot 23, which was 36.6 feet. The contention between the parties was, whether the excess in the block should be apportioned between all the lots, or should be given wholly to lots 1 and 23. The trial court having apportioned the excess equally among all the lots, the plaintiffs appealed.

*Rietbrock and Halsey*, for the appellants.

*Barnes and Barnes, and Shepard, Haring, and Frost*, for the respondents.

**CASSODAY, J.** The real controversy is as to the exact location of the line between lots 5 and 6, mentioned in the forego-

ing statement. The defendants own the north thirty-one and a half feet of lot 6, and the building situated thereon, and the real question is, whether that building extends over the north line of that lot onto lot 5. The plaintiffs contend that it does, for a distance of about one foot, while the defendants contend that it is wholly upon lot 6. To use the language of the learned counsel for the plaintiffs, "the civil engineers and surveyors of both plaintiffs and defendants concur in measurements from land-marks on Martin Street to the north line of lot 6. The distinction to be drawn between them is only in the apportionment made in the whole block. The plat shows that lots 2 to 11, inclusive, of block 68, are 60 feet frontage each on Jefferson Street, while lot 1 is marked 74.6 feet. The whole distance, therefore, from Martin to Division Street by the plat is 674.6 feet, and by the measurement of the engineers the actual distance now found in the block as occupied is 678.08 feet." He contends that such excess of frontage—to wit, the 3.48 feet—belongs wholly to said lot 1, notwithstanding its dimensions purport to be specifically given upon the plat, as well as all the other lots in the block. If his contention prevails, then it is conceded that the building of the defendants extends over the line, and about one foot onto lot 5. The defendants contend that such excess should be apportioned among the several lots fronting on Jefferson Street, according to their respective frontage. Had the plat given the specific dimensions of each of the several lots fronting on Jefferson Street, except lot 1, and given no dimensions of that, then such absence of the dimensions of that lot would have evinced an intention that it should include whatever should be left after setting off the several lots of which the specific dimensions had thus been given, whether the same should be more or less; but where, as here, the specific dimensions of each and all of the several lots fronting on Jefferson Street are given upon the plat, and there is no lot in the block of which the specific dimensions are not thus given, there seems to be no substantial reason why such excess should be given wholly to one lot merely because its dimensions as given upon the plat differ from those of the other lots.

This court has repeatedly held, in effect, that where a piece of land is subdivided into lots, and a plat of the subdivision recorded, and the actual aggregate frontage of such lots is less than is called for by the plat, the deficiency must be



divided among the several lots in proportion to their respective frontage as indicated by the plat: *Jones v. Kimble*, 19 Wis. 429; *O'Brien v. McGrane*, 27 Wis. 446; *Westphal v. Schultz*, 48 Wis. 78. This is certainly not inconsistent with section 770 of the Revised Statutes. These cases have been cited approvingly in a recent case in Kansas, where it is held that, "on a line of the same survey, and between remote corners, the whole length of which is found to be variant from the length called for, it is not to be presumed that the variance was caused from the defective survey in any part, but it must be presumed, in the absence of circumstances showing the contrary, that it arose from imperfect measurement of the whole line; and such variance must be distributed between the several subdivisions of the line in proportion to their respective lengths": *Miller v. Topeka Land Co.*, 44 Kan. 354. To the same effect are *Moreland v. Page*, 2 Iowa, 139; *Newcomb v. Lewis*, 31 Iowa, 488; *Francois v. Maloney*, 56 Ill. 399; *Martz v. Williams*, 67 Ill. 306. The same principle maintains where the actual measurements are in excess of the dimensions specifically designated upon the plat, as in case of a deficiency: *Miller v. Topeka Land Co.*, 44 Kan. 354; *Witham v. Cutts*, 4 Me. 81; *Wolfe v. Scarborough*, 2 Ohio St. 361. In *McAlpine v. Reicheneker*, 27 Kan. 257, a tract of land had been partitioned by proceedings in the district court among several joint owners, and afterwards a question as to the correct location of the boundary lines among the several allottees arose, and it was, among other things, held that "if no monuments were set, except theoretically on paper, the proper location of these monuments will be determined by prorating the distances as given in the records, according to the length of frontage of the several allotments. If the actual computed sum of the length of the several allotments as given exceeds the length of the tract partitioned, it will be construed that the decree means that, upon the hypothesis that the entire length of the whole tract is as stated, then the length of each assignment shall be as given; but if it be less, then the assignment of allotments must lose in like proportion."

Upon authority as well as reason, the trial court was clearly right in holding that the excess named should be apportioned among the several lots fronting on Jefferson Street in accordance with their respective frontage. It follows that no part of the building of the defendants extended

onto the lot of the plaintiffs, nor beyond the boundary of lot 6. The complaint of the plaintiffs is for unlawfully withholding a portion of lot 5, but the facts disclose that neither the defendants nor their testator ever possessed, occupied, or claimed any portion of that lot, but only possessed, occupied, and claimed a portion of lot 6. This being so, it is obvious that the leases of portions of lot 5, in evidence, running to one or more of the remote grantors of the original defendant, are of no significance.

By the COURT. The judgment of the circuit court is affirmed.

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THE RULE LAID DOWN IN THE PRINCIPAL CASE is one upon which the decisions are harmonious. If a block or other tract of land has been divided into lots or other smaller parcels, and the lines or corners of these smaller parcels have not been surveyed, and designated by posts or other visible marks or monuments, or if, being so surveyed and designated, the marks and monuments are lost and cannot be found, and upon measurement of the larger tract, any line thereof is found to be either shorter or longer than it is stated to be in the original plat or field-notes, the causes contributing to such mistake will be presumed to have operated equally in all parts of the original plat or survey, and hence every lot or parcel must bear the burden or receive the benefit of a corrected resurvey, in the proportion which its frontage as stated in the original plat or field-notes bears to the whole frontage as there set forth: *O'Brien v. McGrane*, 27 Wis. 446; *Martz v. Williams*, 63 Ill. 306; *Francois v. Maloney*, 56 Ill. 399; *Newcomb v. Lewis*, 31 Iowa, 488; *Moreland v. Page*, 2 Iowa, 139; *Wilham v. Cutts*, 4 Mo. 31; *McAlpine v. Reicheneker*, 27 Kan. 257; *Miller v. Topeka Land Co.*, 44 Kan. 354; *Parks v. Boynton*, 98 Pa. St. 370; *Quinnin v. Reimers*, 46 Mich. 605; 49 Mich. 449.

UNDER THE REGULATIONS OF THE UNITED STATES governing the surveys of the public lands, any excess or deficiency existing on the northern or western boundary of a township is left in the tier of quarter-sections adjacent to such boundary. Therefore, if a quarter-section stake in the east or west line of one of the sections on the north side of a township is lost, it cannot be relocated by placing it equi-distant from the north and south lines of the section, but must be re-established by commencing at the southeast or southwest corner of the section, as the case may require, and running thence north one half mile, leaving all beyond that point to constitute the quarter-section next to the township line; and this rule appears to remain applicable, though upon a resurvey the section-line is found to be longer or shorter than it is declared to be by the field-notes of the original survey made under authority of the United States: *Knight v. Elliott*, 57 Mo. 317; *Vaughn v. Tate*, 64 Mo. 491.

**WRIGHT v. MULVANEY.**

[78 WISCONSIN, 89.]

**FISHERY AND NAVIGATION.** — ALL PERSONS HAVE A RIGHT TO FISH IN PUBLIC WATERS, but such right is subordinate to the right of others to navigate the same waters.

**NAVIGATOR IN PUBLIC WATERS IS ANSWERABLE** for carelessly and negligently running his vessel upon the nets of a fisherman in the same waters, and cannot escape liability by proving that he did not act maliciously or wantonly.

**AS BETWEEN NAVIGATORS AND FISHERMEN IN PUBLIC WATERS**, when their rights necessarily conflict, the latter must yield to the former, but the navigator may not, by his own negligence, unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right. Thus he may run his vessel over a net in the night-time when he cannot see it, or in the daytime if he cannot avoid it without interfering with the reasonable prosecution of his voyage, or is driven upon it by stress of weather; but if he runs over the net in daylight, in a calm sea, when, if he looks, he cannot fail to see it, and seeing, might easily, and without prejudice to his voyage, avoid it, he is answerable.

**NAVIGATOR IS LIABLE TO A FISHERMAN** for running over his nets with a steam-tug, when they were not in the usual route or course for tugs, and were in a place where they could be readily seen by the wheelman or lookout on the tug a considerable distance before reaching them, and the course of the tug, after the nets were seen, might have been changed so as to avoid them, though the navigator or his servants did not run over them maliciously or wantonly, but merely through negligence.

**CONTRIBUTORY NEGLIGENCE.** — The fact that fishermen were taking fish from a pot when a steam-tug ran over their nets, but gave no warning other than that implied by their presence, does not show, as a matter of law, that they were guilty of contributory negligence, but makes it proper that such negligence be submitted to the jury.

**PRACTICE.** — **PARTY PREPARING A QUESTION** to be submitted to a jury cannot afterwards obtain a reversal on the ground that the question was insufficient.

**PRACTICE.** — **SPECIAL VERDICTS.** — If a special verdict covers all material controverted questions of fact, it is not error to refuse to submit to a jury certain other questions.

**DAMAGES.** — **PROSPECTIVE PROFITS** which might have resulted from a catch of fish had the plaintiffs' nets not been destroyed by the defendant's negligence cannot be allowed as damages, because from the character and conditions of the business the jury could have no sufficient basis for ascertaining such profits, and any assessment thereof must rest largely upon conjecture.

**ACTION** to recover damages to the plaintiffs' fish-nets. The plaintiffs, being fishermen in the waters of Green Bay, set their net therein at right angles to the shore, where it was held in position by posts, five rods apart, reaching about four feet above the surface of the water. These posts could be seen in daytime or in clear weather for a considerable dis-

tance, and at a place called a pond or pot, and in its vicinity, the posts were from eight to twenty feet apart, and more easily seen than at the places where they were more distant from one another. The defendant was the owner of a steam-tug, with which, on a still and clear morning, the net of the plaintiffs was run over and injured. This injury was inflicted without the knowledge or consent of the defendant or his employees; but the net was not in the usual route of steam-tugs, and it was so placed in the water that it could readily have been seen and avoided by the wheelman or lookout on the tug, and the course of the tug, after the net was in sight, might have been changed so as to avoid it, without prejudice to the reasonable prosecution of the voyage. The jury found that the plaintiffs were not guilty of contributory negligence; that the net was damaged in the sum of \$110, and the plaintiffs, in consequence thereof, were damaged in their business in the further sum of \$200. Judgment being entered for plaintiffs, defendant appealed.

*Ellis, Greene, and Merrill*, for the appellant.

*Webster and Wheeler*, for the respondents.

LYON, J. 1. The learned counsel for defendant maintains that his client is not liable in this action unless he or his servants ran the steam-tug over plaintiffs' net maliciously or wantonly. The jury have negatived the existence of any such malice or wantonness by finding that the injury was without the knowledge or consent of the defendant or his servants navigating the tug. If, therefore, the proposition of counsel that the defendant is only liable for the results of his malice or wantonness is correct, there can be no recovery in this action.

We cannot doubt that the plaintiffs might lawfully fish in the waters of Green Bay as of common right, subject only to legislative control, although they have shown no such right by prescription or express grant: See 8 Am. & Eng. Ency. of Law, 24, 32, and notes. The defendant might also lawfully navigate those waters with his steam-tug, and undoubtedly the right of navigation is paramount to that of fishing. But it does not necessarily result from this that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a

proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict, the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right. Thus he may run his vessel over a net in the night-time when he cannot see it, or in the daytime if he cannot avoid it without interfering with the reasonable prosecution of his voyage, or be driven upon it by stress of weather, and not be liable therefor. But if he runs over the net in broad daylight in a calm sea, when, if he looks, he cannot fail to see it, and seeing, might easily and without prejudice to his voyage avoid it, the rule would be a strange one which would absolve him from liability because he merely failed to look and see the net, and was not therefore actuated by malice or wantonness.

In support of his contention, counsel for defendant cites *Post v. Munn*, 4 N. J. L. 61; 7 Am. Dec. 570; and *Cobb v. Bennett*, 75 Pa. St. 326; 15 Am. Rep. 752; also a statement of the doctrine of those cases in Gould on Waters, sec. 87. In those cases it appeared that the persons in charge of the vessels knew the location of the nets, and willfully—or in other words, maliciously and wantonly—ran their vessels into them unnecessarily. Of course, the owners of the vessels were held liable for the damage to the nets. The principle fairly deducible from these cases is, we think, correctly stated in a head-note to the Pennsylvania case, as follows: "A vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice, and does no unnecessary damage." How can it reasonably be said that the master does no unnecessary damage if he runs his vessel upon a net and injures it, when by the exercise of a little forethought and care he could have avoided doing so without prejudice to the reasonable prosecution of his voyage? We conclude that in the present case the negligent failure of the defendant and those operating his steam-tug to see the net and avoid it, when it could have been avoided without detriment to the prosecution of the voyage, is a sufficient basis for a recovery in this action.

2. The proofs show that the plaintiffs were taking fish from the pot when the steam-tug ran through the net, but gave no warning, other than that given by their presence there, to those

in charge of the tug that the net lay across its path. It is claimed that this was contributory negligence on the part of the plaintiffs which defeats the action. We cannot say as matter of law that it was such negligence, yet the fact was a proper one to be submitted to the jury on the question of contributory negligence, and the judge did so submit it in his charge. But the question the jury were required to answer did not include that fact. It was, whether the plaintiffs were guilty of any negligence which contributed to the injury "in locating their net at that place and at that time." The question was prepared by, and submitted at the request of, defendant's counsel, who neither requested nor suggested that another and broader question should be submitted on the same subject. The court had the right to understand, and evidently did understand, that the question included everything the defendant desired to have submitted on the subject of contributory negligence. Under such circumstances, if the defendant can now be heard to allege the insufficiency of the question as ground for a reversal of the judgment, the right to a special verdict may be used as an instrument of injustice: *Schultz v. Chicago, M., & St. P. R'y Co.*, 48 Wis. 375. It must be held that on the subject of contributory negligence the defendant is concluded by the answer to the question thus submitted at the request of his counsel.

3. A clause in the charge to the jury is claimed to be erroneous. All of the men on board the tug at the time the net was injured were witnesses on the trial, and each denied knowledge on his part that the tug ran through the net. The question whether it did so was submitted to the jury. In submitting it the court said: "The men who were on that tug at the time have all been witnesses, and they deny any knowledge of its going through, and it necessarily follows, it seems to me, that if the tug did go through, some of these men have either forgotten the circumstance or have willfully sworn falsely in reference to it." By this remark the judge expressed the opinion hypothetically that if the tug went through the net, some of the men on board would have known it; and from this premise he deduced the very rational conclusion that if the tug did go through the net, those men had either forgotten the fact or falsely denied knowledge of it. It seemed to the learned circuit judge quite incredible that the tug could have been navigated through the net in broad daylight, in calm, clear weather, and no person on board of

her know the fact. And so it seems to us. Under the circumstances, we are unable to say that the challenged remark of the judge was improper. But were it improper, it could not have harmed the defendant, for, notwithstanding the hypothetical criticism by the judge upon the testimony of the men on the tug, the jury believed what they said, and found that the tug ran through the net without their knowledge. This renders the alleged error immaterial.

4. The special verdict sufficiently covers all material and controverted questions of fact in the case. Hence it was not error to refuse to submit certain other questions to the jury proposed on behalf of defendant as the basis of a special verdict.

5. There is included in the judgment two hundred dollars for damages to the plaintiffs' business, resulting from the injury to their net, — that is to say, for loss of the profits of their business during the time necessarily required to restore the net. The net was never restored, and the plaintiffs' fishing in that vicinity for the remainder of the season was all done with another net located about one half mile south of the injured net. The testimony tends to show that the plaintiffs lifted the pot of their net and took the fish therefrom about every alternate day before the injury; that the profits of each lift were from forty to fifty dollars; and that it would have required about ten days to restore the injured net, had it been restored. There was no other testimony introduced bearing upon the question of profits. Hence the jury necessarily assessed the damages to plaintiffs' business on the basis of four or five lifts of fish, at a profit of from forty to fifty dollars each.

There was no testimony as to whether the conditions of successful fishing remained for ten days after the injury as favorable as they were immediately before the same, — none to show that the weather continued favorable during the ten days; that storms did not intervene to interrupt the business; that the fish continued to run over the same ground in equal abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made their assessment of damages to plaintiffs' business largely upon mere conjectures. They must have assumed without proof that a business proverbially uncertain in results, depending for its success upon numerous

plaintiff, on behalf of defendants, to pay the board-bills of these men.

The other question is, Was it within the scope of McQuade's authority as agent for defendants to bind them by such promise? The question must be answered in the affirmative. He was the representative of the defendants in the building of the spur-track, and superintended the work for them. He had authority to compel the subcontractors to keep sufficient men on the work to fulfill their contracts with defendants. If, to do this effectually, it was necessary to pledge his principals to pay the board-bills of the laborers (and it must be assumed that it was), he had apparent if not actual authority to charge the defendants with such liability. In other words, he acted within the scope of his authority as agent of defendants when he promised, in their behalf, to pay the board-bills. All this is elementary law.

The charge of the court to the jury accords with the foregoing views, and none of the exceptions thereto are well taken.

By the COURT. The judgment of the circuit court is affirmed.

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AGENCY — LIABILITY OF PRINCIPAL FOR ACTS OF AGENT. — A principal is bound by all acts of the agent within the scope of his employment: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563; *Wachter v. Phoenix Ass. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600, and note. An agent who is authorized to let a logging contract for his principal is authorized to do everything necessary to carry out such a contract: *Busch v. Wilcox*, 82 Mich. 315. Where the vendee of a brick-yard allows the president of the corporation to manage the yard, he becomes such an agent that his contracts are binding upon the vendee if made in the course of business: *Gladd v. Keewau*, 78 Mich. 696.

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## OSBORN v. BLACKBURN.

[78 WISCONSIN, 209.]

JUDGMENTS — LAWS OF ANOTHER STATE. — JUDICIAL NOTICE will not be taken by the courts of one state of the laws of another, and therefore, in considering the validity and effect of a judgment entered in another state, they will presume that the laws of such state are the same as those of the state in which such courts are held.

JUDGMENTS OF OTHER STATES. — If the laws of another state are relied upon for the purpose of showing what faith and credit should be given to a judgment entered therein, they must be proved, like other facts.

*Bashford and Disney, and Fayette Marsh*, for the appellants.  
*Lamoreux, Gleason, Shea, and Wright*, for the respondent.



COLE, C. J. This is a suit upon a replevin bond which was executed by the defendants in an action brought in the district court of Minnesota. The bond was given to enable the defendant in that action to retain possession of the property in controversy, and was conditioned that the obligors should pay any sum which the plaintiff might recover. A judgment for \$1,653.70 was recovered in the Minnesota court, which has not been paid, and hence this suit upon the bond. Some technical objections are taken to the Minnesota judgment, as that it has not been perfected by the taxation of the costs and disbursements being inserted therein, and that the judgment was not in the form prescribed by the Minnesota statute. No proof was made as to what the law of Minnesota was upon the subject. The learned counsel for the defendants contends that the courts of this state will take judicial notice of what the laws of Minnesota are without proof. If this contention of counsel is not sustained, it is practically admitted that the judgment from which this appeal is taken must be affirmed.

In the case of *Rape v. Heaton*, 9 Wis. 329, 76 Am. Dec. 269, the law upon this question was thus laid down: "The act of Congress requiring such faith and credit to be given to judgments as they would have in the states where rendered does not profess to determine in what manner the courts shall ascertain such effect, and cannot be construed as making it imperative on them to take judicial cognizance of the laws of other states. There are many cases where the courts are bound to decide upon contracts according to the laws of other states, where they were made or are to be performed, but it has never been held that in such cases they were bound to take judicial notice of those laws. So here, the constitution and act of Congress require the effect and credit of judgments to be determined according to the law of the state where rendered, but leave the manner in which courts shall ascertain those laws to be determined by the general principles of pleading and proof applicable to the subject. The act of Congress does not undertake to determine this, and even if it did it is very doubtful whether it would be competent for Congress to provide in what manner the laws of one state should be proved in another": Page 339. And the opinion proceeds to state the decision of this court on the point, in this language: "The true rule is, that, in such cases, courts are not bound to take actual notice of the laws of other states, in the

absence of all proof, but may presume them to be in accordance with their own. So that wherever any difference is relied on, it is incumbent on the party relying on it to prove such difference for the information of the court."

The doctrine of *Rape v. Heaton*, 9 Wis. 329, 76 Am. Dec. 269, was followed in *Walsh v. Dart*, 12 Wis. 635; *Hull v. Augustine*, 23 Wis. 383; *Pierce v. Chicago & N. W. R'y Co.*, 36 Wis. 283; *Horn v. Chicago & N. W. R'y Co.*, 38 Wis. 463; *Kellam v. Toms*, 38 Wis. 592. But the question is so fully and ably considered by Mr. Justice Paine in *Rape v. Heaton*, 9 Wis. 329, 76 Am. Dec. 269, both upon principle and authority, that it is unnecessary to extend the discussion here, or to attempt to fortify the reasoning which led the court to the conclusion so arrived at. We are well aware that there are conflicting decisions upon the question, but we think *Rape v. Heaton*, 9 Wis. 329, 76 Am. Dec. 269, lays down the better rule and is sustained by the greater weight of authority.

It is claimed that the supreme court of the United States, in *Carpenter v. Dexter*, 8 Wall. 513, establishes a different rule. One question in that case was, whether it was necessary to prove the official character of the officer taking the acknowledgment of a deed. The court held that it was not. Unless the statute required the evidence of official character to accompany the official act which it authorizes, no such proof was necessary. And the court said: "Where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. In this case, also, the laws of New York are, by stipulation of parties, considered as evidence."

In *Hanley v. Donoghue*, 116 U. S. 1, the court had occasion to consider the question. Mr. Justice Gray, in delivering the opinion of the court, says: "Upon principle, therefore, and according to the great preponderance of authority (as is shown by the cases collected in the margin), whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the law of that state must be proved, like any other matter of fact. The opposing decisions in *Ohio v. Hinchman*, 27 Pa. St. 479, and *Paine v. Schenectady Ins. Co.*, 11 R. I. 411, are based upon the misapprehension that this court, on a writ of error to review a de-

cision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state; and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort."

Again, in *Chicago & A. R'y Co. v. Wiggins Ferry Co.*, 119 U. S. 616, the court, when considering the effect of the constitutional requirement that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," say it implies that the public acts of every state shall be given the same effect by the courts of another state that they had by law and usage at home; and the learned chief justice says: "Whenever it becomes necessary under this requirement of the constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of the state is charged with knowledge of the laws of another state, but such laws are in that court matters of fact which, like other facts, must be proved before they can be acted upon. This court and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact here."

In view of these excerpts, we think the learned counsel is mistaken in the assumption that the supreme court of the United States has laid down a rule in conflict with *Rape v. Heaton*, 9 Wis. 329; 76 Am. Dec. 269. But that the question may be reviewed by that court, at the request of counsel we will state the precise point we decide in the case, which is, that the trial court was not bound to take judicial notice of the law of Minnesota regulating the action of replevin; but in the absence of all proof on the subject, the presumption would be, that it was the same as the law of this state. This clause will be inserted in our judgment.

It follows from these views that the judgment of the circuit court is affirmed.

By the COURT. Judgment affirmed.

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JUDGMENTS—LAWS OF ANOTHER STATE—JUDICIAL NOTICE.—Judicial notice will not be taken of the laws of another state. Its common law will

be presumed to be the same as that of this state: *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159, and note. Only common-law rights will be recognized by the courts of sister states: *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156; *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169.

**JUDICIAL NOTICE—LAWS OF ANOTHER STATE.**—The law of another state, whether declared by judicial decision or otherwise, must be pleaded or proved, and will not be judicially noticed: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note. See Freeman on Judgments, 4th ed., sec. 571.

## LARSEN v. JOHNSON.

[78 WISCONSIN, 300.]

**POWER TO DISPOSE OF THE FEE OF REALTY.**—A devise of land to the testator's widow "to be for her sole use and benefit, so long as she shall live, with power to dispose of the same if necessary for her support and comfort in this life," vests in her the power to dispose of the fee if necessary for her support and comfort, though the will further declares that whatever remains after her death shall go to the heirs of the testator.

**WITNESSES.**—A STATUTE PROHIBITING A PARTY FROM TESTIFYING as a witness to a contract or conversation between himself and a deceased person, when the opposite party derives his title from such decedent, does not render a donee under a power to sell incompetent to testify as a witness to a contract between himself and the holder of the power, resulting in the power being exercised for the purpose of giving him title when the opposing parties do not claim under the decedent or the power, but insist that it did not confer authority to make the conveyance under which the witness claims.

**CONTRACT IS NOT VOID**, under section 2307 of the Revised Statutes of Wisconsin, because its consideration was the marriage of the parties, if the marriage is but an incident of the contract, and it is supported by a sufficiently valuable consideration aside from the marriage.

**THOUGH AN AGREEMENT IS VOID BECAUSE NOT IN WRITING**, its complete performance takes it out of the statute, and the fact that it was not in writing is no longer material.

*Hand and Fleet, and Luse and Wait*, for the appellants.

*T. M. Kearney and J. R. Dyer*, for the respondent.

**ORTON, J.** The testimony tends to prove, and the circuit court found, substantially, the following facts: One Austin Larsen died July 20, 1857, seised in fee-simple and in possession of eighty acres of land in the county of Racine, leaving no children, but leaving his widow, Susan Larsen, and a last will and testament, by which he gave and bequeathed to his beloved wife, the said Susan Larsen, all of said land by particular description, "to be for her sole use and benefit so long as she shall live, with power to dispose of the same if it shall

be necessary for her support and comfort in this life." He also devised to her certain kinds of personal property for life, and his goods and chattels generally to be hers forever. The residuary clause of the will is, that "whatever remains after her death shall go to the heirs of him and her in the manner provided by the laws of this state." His only heirs were his two brothers, the appellants, and the children of two deceased brothers. The said will was duly proven and admitted to probate in said county on the seventh day of September, 1857, and said Susan Larsen was appointed sole executrix, having been so named in the will.

About eleven acres of said land only was partially cultivated, and the buildings thereon were a small log-house and a log-shed covered with brush and straw, and of little value. The remainder of the land was covered with small and poor timber, and some marsh. The said Susan Larsen remained in possession of said land, and did all she could to derive her support therefrom, and the little personal property upon it, but was unable to do so, until about June, 1859. She had been compelled to contract debts for such purpose to the amount of over five hundred dollars, and was unable to rent the land for an amount sufficient for her support. It sufficiently appeared from the testimony that the time had come when it was necessary to dispose of said land for her support and comfort, and for the payment of her debts. About that time the said Susan Larsen entered into a contract with the respondent that he should provide for her support and comfort during her life, pay her said debts, take care of, manage, and improve said land so as to make it productive for such purpose, and to that end it was agreed that they should become husband and wife, and live together on said land, and that, in consideration of the above provisions for her support and comfort, the said Susan should convey said land to the respondent in fee-simple. In execution of the said contract, having been married to the said Susan on the ninth day of June, 1859, the respondent at once entered into the possession of said land, provided for the support and comfort of the said Susan during all the time thereafter and until the twenty-third day of March, 1868; and he paid off said indebtedness, with interest, removed stumps, trees, and brushwood from said land, dug ditches for the drainage of the said marsh-land, built fences, erected a granary and other farm buildings, and labored diligently to improve said land, and rendered the

same sufficiently productive for their comfortable support, and he thereby gave said land its then principal market value. The respondent fully performed his part of said agreement, and he was therefore entitled to the conveyance of said land by the said Susan Larsen, according to her part of the agreement. In execution of said contract on her part, the said Susan Larsen, on the said twenty-third day of March, 1868, conveyed said land to one Charles Alby by warranty deed, and caused the said Alby and wife to convey the same to the respondent, Andrew Johnson, by a like warranty deed, and he thereby became entitled to said land in fee-simple. From that time until the fourteenth day of April, 1884, when the said Susan, then Susan Johnson, died, the respondent provided amply for her support and comfort. It appeared that the said Susan had always been in poor and feeble health, and unable to do much physical labor.

There are fifteen exceptions to the findings of the above facts, but only a few of them are contested in the brief of the learned counsel of the appellant.

It appears that the record of the will and of the proceedings of probate had been destroyed by fire, and copies thereof had been established by the county court according to the statute, and such restored records were offered in evidence. Exception was taken to their admission. They appear to have been restored according to law, and to be competent evidence to prove the contents and probate of the will. Exception was also taken to the testimony of the respondent to prove the contract between himself and the said Susan Larsen, because the said Susan Larsen was not living. We are cited to section 4069 of the Revised Statutes. The statute does not exclude such testimony, because in this action the plaintiffs, as the "opposite party, did not derive their title from such deceased person."

There are two objections made by the learned counsel of the appellants to the validity of the contract: 1. Because the consideration was the marriage of the parties: R. S., sec. 2307. 2. Because the contract was not in writing, as required by section 2302 of the Revised Statutes.

1. The marriage of the parties was not the consideration of the contract to convey the land, or any part of it. It was only incidental as the condition or relation in which the respondent should render to the said Susan Larsen, and she receive, her support and comfort as the consideration of the

conveyance. The agreement to marry may have been made at the same time, but not as any part of the consideration for the conveyance. It was for the benefit of the respondent as much as, if not more than, it was for her benefit. There was sufficient lawful and valuable consideration to support the contract, aside from any supposable consideration of marriage.

2. The agreement, although not in writing, was fully executed and performed. This, by all authority, takes it out of the statute. The said Susan Larsen, now deceased, received from the respondent her support and comfort as long as she lived, and the conveyance was made in full execution and performance of the contract on both sides.

The main question in this case is, What is the nature and extent of the power given in this will to the widow, Susan Larsen, in the words of the will, "with power to dispose of the same [the land] if it shall be necessary for her comfort and support in this life"?

It is the contention of the learned counsel of the appellant, — 1. That this power does not enlarge the life estate of the said widow to a fee; that is, it is a power to dispose of the life estate only. The authorities cited by the learned counsel are not applicable to this case. There may be similar language in a will, construed in the light of accompanying facts and circumstances, which will not bear a more extended construction to carry out the clear intention of the testator. But the language as well as the circumstances in such cases are entirely different from those of this will, as in *Jones v. Jones*, 66 Wis. 310, 57 Am. Rep. 266, and the other cases cited. The only question in which the respondent is interested is, whether the power may pass the fee. Whether it is conditional or absolute, restricted or unrestricted, is immaterial to him, if the contingency had happened upon which she had the power to dispose of the land in fee. It is claimed in his behalf that such was the case, and there was much testimony introduced to show that it was necessary to dispose of all this land, in its then condition, for her support and comfort, and that the proceeds of the sale were all consumed for such purpose; and so the circuit court found, and, we think, correctly. 2. By far the greater number of the authorities cited by the learned counsel of the appellants are in support of this construction of the will, and with much candor they say: "The cases are numerous that, where a power is given to the donee to sell for

the purpose of obtaining her necessary support, it is a limited one, and can only be exercised where the necessity arises, and that it is incumbent upon the grantee under the power to show that it is properly exercised." This is a concession of all that the respondent need to claim in this case to support the judgment. If the widow had the power to dispose of the corpus or fee of the estate, on the condition or contingency of its necessity for her support and comfort, and the evidence shows that such a contingency arose, then the title of the respondent is perfect.

I am inclined to think that this is the proper construction of this power. The learned counsel have furnished all the authorities necessary to sustain this position, and they are very much in point: *Park's Adm'r v. American H. M. Society*, 62 Vt. 19; *Minot v. Prescott*, 14 Mass. 496; *Whitcomb v. Taylor*, 122 Mass. 248; *Cutting v. Cutting*, 86 N. Y. 522; *Morford v. Dieffenbacher*, 54 Mich. 605. In this last case, the devise was for the life of the devisee, with power to dispose of enough of the estate for his support. The court holds that this gave a life estate, with conditional power of disposal in fee: *Henderson v. Blackburn*, 104 Ill. 227; 44 Am. Rep. 780. In *Goudie v. Johnston*, 109 Ind. 427, the devise was of personal property to the wife for life, with power to sell. Held, that it was a power to dispose of the corpus of the estate. In *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780, the devise was of a life estate, with power of disposition of what she may need of it. It was held that the power gave the right of disposal of the fee, if the necessity should arise. A similar case is that of *Terry v. Wiggins*, 47 N. Y. 512. In *Bishop v. Remple*, 11 Ohio St. 277, there was a power of disposal during the life of the devisee. The court holds "that the power of selling and conveying is inconsistent with the idea of a naked life estate," and that the wife had power to sell and convey the land in fee, and the deed in question was upheld as a sufficient execution of the power. In *Bamforth v. Bamforth*, 128 Mass. 280, the will gave an estate for life, with power of disposing of as much of the estate as may be necessary for the devisees' comfortable support as long as either shall live. Chief Justice Gray says: "Thereby giving them a power to dispose of so much of the fee as may be necessary for that purpose." It was held, also, in this case, as in many of the above cases, that the will created no trust in such a case. *Stevens v. Winship*, 1 Pick. 317, is a quite



similar case, with a power to sell "in case the wife shall stand in need for her comfortable support." This is cited in the above case. It was held "that the devisee would take a fee on the happening of such contingency." *Johnson v. Battelle*, 125 Mass. 453, is to the same effect, as is also *Larned v. Bridge*, 17 Pick. 339. See also *Giles v. Little*, 104 U. S. 291; *Smith v. Snow*, 123 Mass. 323; *Jenkins v. Compton*, 123 Ind. 117; *Kaufman v. Breckinridge*, 117 Ill. 305. In nearly all of the above cases there was a residuary clause in the will that any remainder should go to heirs or others named. In case the land is sold under the power, what may remain of the proceeds on the death of the devisee, unexpended, passes under the residuary clause, and nothing else. The authorities seem to be nearly if not quite uniform, that under such a power, the widow may sell and convey the fee whenever it shall be necessary for her support. It would seem that our statute of powers is to the same effect: R. S., secs. 2107, 2108. We have seen that such a power is unaccompanied by any trust. Section 2112 of the Revised Statutes seems to settle the disputed question whether such a power is absolute: "It shall be deemed absolute if the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit."

It follows, therefore, that Susan Larsen had the power to dispose of the land in fee, and that it was properly executed by the sale and conveyance thereof to the respondent, and that he held the same in fee-simple as against the appellant heirs of the testator.

By the Court. The judgment of the circuit court is affirmed.

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DEVISES—WHEN CONSTRUED AS DEVISES IN FEE.—An unqualified devise of land, with a provision that should any of it remain after the death of the devisee, it must be given to his heirs, gives an estate in fee to the first taker: *Halliday v. Stichter*, 78 Iowa, 388. This rule has been applied to devises to a testator's wife "and the lawful heirs of her body": *McConley v. Buckner*, 87 Ky. 192; to a devise to a wife, "and her heirs and assigns forever, but upon express condition that if any portion of my said estate should remain in the possession of my said wife at her decease, such remainder shall be divided as follows": *Joslin v. Rhoads*, 150 Mass. 301; to a wife upon the condition merely that she settle up the testator's estate: *Giles v. Anslow*, 128 Ill. 189; to a devise providing that "my wife shall have all my property, to do with as she pleases": *Urey v. Urey*, 86 Ky. 354; *Sturgis v. Paine*, 146 Mass. 354; to a devise giving a wife an estate for life in land, with power to sell and convey, and expend the proceeds "for her own comfort and support": *Car-*

roll v. *Shea*, 149 Mass. 517; to a devise giving the wife the entire estate, provided she should give the testator's children such an education as her means will afford, etc.: *Hoviss v. Barber*, 29 S. C. 466. Compare *Carpenter v. Van Olinder*, 127 Ill. 42; 11 Am. St. Rep. 92, and note; *Moffat v. Cook*, 150 Mass. 529.

DEVISE TO WIDOW — WHEN CONSTRUED AS A DEVISE OF AN ESTATE FOR LIFE: See note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 99, 100; *Boggin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698, and note; *Long v. Paul*, 127 Pa. St. 456; 14 Am. St. Rep. 862, and note; *Peckham v. Lego*, 57 Conn. 553; 14 Am. St. Rep. 132; *Miller v. Potterfield*, 86 Va. 876; 19 Am. St. Rep. 919. The testator's wife takes only a life estate, under a devise to her of all the realty during her natural life, with power to dispose thereof as she wished, providing that she did not marry, but in case she should marry, then the property shall go to certain persons living at the time of her marriage or death: *Douglass v. Sharp*, 52 Ark. 113; *Patty v. Goolsby*, 51 Ark. 61; or under a devise giving the income of all the testator's property to his wife for life, with power to dispose of the realty for her comfort, the property to be in her possession for the family, and for the use and education of a daughter, and in trust for a son: *Will of Simmons*, 55 Conn. 239 (compare similar case of *Siddons v. Cockrell*, 131 Ill. 653); or where a testator devised all his property to his wife for life, with remainder over to his children, with power in the wife to dispose of the realty to pay debts or make advancements: *Robertson v. Robertson*, 120 Ind. 333; *Jenkins v. Compton*, 123 Ind. 117; *Lewis v. Pitman*, 101 Mo. 281; *Oax v. Sims*, 125 Pa. St. 522; or under a devise giving to the wife all the estate for her natural life, with the power to use as much thereof as she may see fit for her comfort and support and for benevolent purposes: *Parks v. American etc. Society*, 62 Vt. 19; *Reid's Estate*, 80 Mich. 228; *Best v. Best*, 88 Ky. 569. The widow takes a life estate under a devise to her "during her natural lifetime, and at her decease the same to go to her children": *Giffen's Estate*, 138 Pa. St. 327; *Kearney v. Kearney*, 72 Md. 41; *Mixter v. Woodcock*, 147 Mass. 613. Estates for widowhood are created by devise by the same words which create life estates, except that the former are made to terminate upon the remarriage of the devisee, not upon her death: *Levingood v. Hoople*, 124 Ind. 27; *Best v. Best*, 88 Ky. 569; *Misenheimer v. Bast*, 106 N. C. 10.

CONTRACTS — MARRIAGE AS THE CONSIDERATION. — As to the requirements of the statute of frauds with respect to marriage settlements, see *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552; *Carter v. Smith*, 82 Ala. 334; 60 Am. Rep. 738; *Peck v. Peck*, 77 Cal. 106; 11 Am. St. Rep. 244, and note.

CONTRACTS — COMPLETE PERFORMANCE, TO TAKE OUT OF OPERATION OF THE STATUTE OF FRAUDS. — If a contract, which was within the statute of frauds when made, and might have been avoided thereby, has been fully performed, the statute furnishes no defense: *McCus v. Smith*, 9 Minn. 252; 86 Am. Dec. 100, and note; *Schultz v. Noble*, 77 Cal. 79; *White v. Cleaver*, 75 Mich. 17.

**ESCHWEILER v. STOWELL.**

[78 WISCONSIN, 515.]

**CORPORATIONS.** — A DEMAND THAT THE BOARD OF DIRECTORS OF A CORPORATION REDRESS AND CORRECT fraudulent acts of which they are alleged to have been guilty need not precede the bringing of an action by a stockholder against them and the corporation to recover property and profits which they have fraudulently diverted to their personal benefit, by voting themselves salaries, and by other fraudulent acts.

**SUIT BY STOCKHOLDER.** — WHEN THE DIRECTORS THEMSELVES ARE THE PARTIES charged with a wrong, or by whose fraud or willful collusion a wrong has been accomplished, and a suit is to be brought against them, they are, by their own acts, incapacitated for the service of representing the corporation in any action for the restitution of its rights, and therefore suit may be brought in the name and on behalf of the individual stockholders, without first making a demand on the managing officers that they take action in the name of the corporation.

*Winkler, Flanders, Smith, Bottum, and Vilas*, for the appellants.

*Frans O. Eschweiler*, for the respondent.

COLL, C. J. Does the complaint in this case state a cause of action? We are of the opinion that it does.

The action is brought in behalf of the plaintiff and other stockholders of the defendant corporation, the Badger Silver Mining Company, organized under the laws of this state, and engaged in the business of mining and extracting silver from mineral deposits in lands owned by it in Canada. It is alleged that the corporation has a capital stock of 50,000 shares, of a par value of five dollars per share; that the plaintiff owns and holds 2,180 shares of such stock, and the defendants Stowell, Robinson, Charles A. and Walter Read, and Sammond own and hold a majority in number of the shares of the capital stock, — namely, 82,000. The complaint states, on information and belief, that the defendant Stowell is now, and has been since May, 1887, the president of the corporation, and is a director thereof; that the defendant Robinson, since December, 1887, has held and still holds the office of vice-president and director, and also, since April, 1888, has held the office of general manager therein; that the defendant Charles A. Read, since May, 1887, has held and still holds the office of treasurer and director of the corporation; and the defendant Walter Read, since said last date, has held and still holds the office of secretary and director therein; and the defendant Sammond, since said date, has held and still

holds the office of director; that said persons form and constitute the board of directors, and the whole thereof, of the defendant corporation.

The complaint then proceeds to state and charge certain acts of fraud on the part of the defendants, and of the unlawful appropriation of the money and property of the corporation to their own use, by way of voting themselves salaries payable out of the funds of the corporation, and other fraudulent acts; and it is alleged that the purpose and design of the directors and managing officers is to so control the business of the corporation as to divert the property, profits, and proceeds of the corporation to their own profit and personal use and benefit, to the great loss and damage of the plaintiff as a stockholder, and of the minority stockholders; that in consequence of these fraudulent acts and misconduct on the part of the directors and managing officers the plaintiff has been deprived of his proper share of the profits of the corporation, and the market value of the stock held by him has been much depreciated. The complaint asks that the defendants account for the money of the corporation which they have illegally and fraudulently appropriated to their own use, and that judgment be entered against them, jointly and severally, for said sums, and that a receiver be appointed to take control of the affairs and the business of the corporation, and that the plaintiff have such other and further relief as may be just and equitable.

Now, it is said the complaint is fatally defective because it does not allege any request to the board of directors, or to any officer of the corporation, to redress and correct the fraudulent acts complained of, and a refusal, on their part, to comply with such request, before suit was brought. It is said that it must appear that such a request was made to the officers, and that it was denied, before a stockholder can bring a suit for the misappropriation of the funds and the property of a corporation; that this is essential to give the stockholder a standing in court. That is undoubtedly the general rule upon the subject; but the rule has exceptions as well established as the rule itself. Where the directors and the managing board itself are charged with the fraudulent acts and collusion, as they are here, it would appear to be a very idle and fruitless thing to ask them to repair their own wrong. They constitute the entire board of directors and the governing body, holding a majority of the shares of stock, and, as

the plaintiff well says, it would be mere mockery to hold that a demand for redress should be made upon the defendants to restore money to the corporation which they had fraudulently appropriated. Suppose one or all of the directors refuse to repair the wrong they have committed, — would a court of justice entertain the strange spectacle of their bringing suit against themselves, being at the same time the plaintiffs and defendants in the action, calling themselves to account for their misconduct, and forcing themselves to restore their unlawful gains? The rule on this point is well stated in *Brewer v. Boston Theatre*, 104 Mass. 387: "A formal application and refusal need not be alleged, if enough appears to show that such an application would be unavailing. When the directors themselves are the parties charged with the wrong, or by whose fraud or willful collusion the wrong has been accomplished, and the suit is to be brought against them, they are, by the very nature of the case, incapacitated for the service of representing the corporation in any action for the restoration of its rights, whether by suit or proceedings *in pais*. If the corporate action is under the control of such parties, it is a sufficient reason of necessity to warrant proceedings by suit in the name and behalf of the individual stockholders."

Ordinarily, of course, redress for a wrong to corporate rights or property must be sought in the name of the corporation, and a stockholder cannot sue for damage to himself individually, unless the corporate authorities refuse to act when applied to. This rule was recognized and acted upon in *Doud v. Wisconsin P. & S. R'y Co.*, 65 Wis. 108; 56 Am. Rep. 620; and *Palmer v. Hawes*, 73 Wis. 46. But where the complaint sets forth such a "state of facts as renders it reasonably certain that a suit by the corporation would be impossible, and a demand on the managing body to act would be nugatory and vain, there an action by a stockholder may be maintained, without alleging or proving any request, demand, or express refusal": *Pomeroy's Eq. Jur.*, sec. 1095; *Rothwell v. Robinson*, 39 Minn. 1; 12 Am. St. Rep. 608; 1 Morawetz on Private Corporations, sec. 242. It would be idle in this case to appeal to the stockholders to redress the wrongs done, by changing the board of directors or managing body. The wrong-doers themselves hold the majority of the shares, and can prevent any such change, so it would be impossible for the plaintiff to expect or obtain redress by the action of the stockholders. Therefore, under these circumstances, we think a court of

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equity will grant a stockholder relief against such gross violations of duty on the part of the officers of a corporation as are stated in the complaint. If the officers are disposed in good faith to discharge their duty to the corporation and its stockholders, they can repair their wrongs by restoring the property which they have unlawfully taken, without waiting to be compelled to do so by a judgment of the court. But to hold that a stockholder has no standing in court, unless he has requested a managing body, who were the wrong-doers, to grant him relief from their fraudulent acts, is extending the general rule beyond all reasonable bounds.

For these reasons, we think the complaint states a cause of action, and that the demurrer to it was properly stricken off as frivolous.

By the COURT. The order of the superior court of Milwaukee County is affirmed.

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**CORPORATIONS — STOCKHOLDER MAY MAINTAIN ACTION AGAINST.** — An individual stockholder may maintain a suit in equity against a corporation to recover damages for depreciation in value of the corporate stock and property caused by the fraudulent conduct of its officers and directors: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note; *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 96 Am. Dec. 95, and particularly note; *Tutwiler v. Tuscaloosa etc. Co.*, 89 Ala. 391. It is not necessary in such an action that the complaint should negative knowledge on the part of the stockholder of the misconduct of the directors: *Horn Co. etc. v. Ryan*, 42 Minn. 196; *Davis v. Gemmell*, 70 Md. 356.

## BROWNING v. GOODRICH TRANSPORTATION CO.

[75 WISCONSIN, 391.]

**CARRIERS. — BURDEN OF PROOF IS UPON A CARRIER** to show that he has complied with his contract, and though his contract exempts him from liability for the "dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier," he must prove that he landed such goods from his vessel.

**CARRIERS ARE PRESUMED TO HAVE BEEN NEGLIGENT WHEN GOODS ARE LOST** and the circumstances of their loss are not explained.

**CARRIERS. — STIPULATION IN A SHIPPING RECEIPT** that certain restrictions of liability therein contained should extend to and inure to the benefit of any other carrier to whom the goods might be delivered for shipment does not, however, protect the latter carrier if it, in receiving the goods, enters into a contract of carriage on its own account from which the stipulation in question is omitted.

**IMMATERIAL ERROR. — Improper admission of evidence concerning the value**

and identity of certain goods is an immaterial error, if the parties have stipulated what the value of such goods is and there is no question of their identity.

*Van Dyke and Van Dyke*, for the appellant.

*Stark and Sutherland*, for the respondents.

LYON, J. The pleadings, the undisputed evidence, and the special verdict establish the facts that the transportation company received the box of clothing in controversy at Chicago for shipment to Milwaukee, and failed to deliver the same to the plaintiffs, who were the owners and consignees thereof; also that the value of the contents thereof was \$231. On these facts, were there no special contract restricting the liability of the transportation company for the loss of the box, there can be no doubt of the right of the plaintiff to recover such stipulated value. But counsel for the transportation company contend that the receipt given for the box at Chicago, by the transportation company, restricts its liability. Undoubtedly that receipt contains the contract of shipment between these parties, and the whole of it, and both parties are bound by it, unless it contravenes some established public policy. There is no claim that it does so. This contract relieves the transportation company from liability "for the dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier." The argument is, that, under the contract, mere non-delivery of the box to the plaintiffs or their agent does not give a right of action, but that a failure by the company to land the goods on dock or pier is essential to such right. Assuming that this position is well taken (as it probably is), the burden is upon the company to show that the box was so landed. We find no testimony in the record tending to show that the box was removed from the vessel on which it was carried to Milwaukee. All that the bill of exceptions contains on the subject is the statement that the defendant gave testimony on the trial "tending to prove the receipt of the box in Milwaukee, and that it had delivered it to said Stoltz; and upon this question each side produced a number of witnesses." Certainly these statements do not show that any testimony was given tending to prove the box was ever landed from the vessel. Unless, therefore, some material error intervened in the rulings of the court on the trial, the judgment is correct.

The judgment may also be upheld on other grounds. The

equity will grant a stockholder relief against such gross violations of duty on the part of the officers of a corporation as are stated in the complaint. If the officers are disposed in good faith to discharge their duty to the corporation and its stockholders, they can repair their wrongs by restoring the property which they have unlawfully taken, without waiting to be compelled to do so by a judgment of the court. But to hold that a stockholder has no standing in court, unless he has requested a managing body, who were the wrong-doers, to grant him relief from their fraudulent acts, is extending the general rule beyond all reasonable bounds.

For these reasons, we think the complaint states a cause of action, and that the demurrer to it was properly stricken off as frivolous.

By the COURT. The order of the superior court of Milwaukee County is affirmed.

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**CORPORATIONS — STOCKHOLDER MAY MAINTAIN ACTION AGAINST.** — An individual stockholder may maintain a suit in equity against a corporation to recover damages for depreciation in value of the corporate stock and property caused by the fraudulent conduct of its officers and directors: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note; *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 95, and particularly note; *Tutwiler v. Tuscaloosa etc. Co.*, 89 Ala. 391. It is not necessary in such an action that the complaint should negative knowledge on the part of the stockholder of the misconduct of the directors: *Horn Co. etc. v. Ryan*, 42 Minn. 196; *Davis v. Gemmell*, 70 Md. 356.

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**CARRIERS. — STIPULATION IN A SHIPPING RECEIPT** that certain restrictions of liability therein contained should extend to and inure to the benefit of any other carrier to whom the goods might be delivered for shipment does not, however, protect the latter carrier if it, in receiving the goods, enters into a contract of carriage on its own account from which the stipulation in question is omitted.

**IMMATERIAL ERROR.** — Improper admission of evidence concerning the value



and identity of certain goods is an immaterial error, if the parties have stipulated what the value of such goods is and there is no question of their identity.

*Van Dyke and Van Dyke*, for the appellant.

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LYON, J. The pleadings, the undisputed evidence, and the special verdict establish the facts that the transportation company received the box of clothing in controversy at Chicago for shipment to Milwaukee, and failed to deliver the same to the plaintiffs, who were the owners and consignees thereof; also that the value of the contents thereof was \$231. On these facts, were there no special contract restricting the liability of the transportation company for the loss of the box, there can be no doubt of the right of the plaintiff to recover such stipulated value. But counsel for the transportation company contend that the receipt given for the box at Chicago, by the transportation company, restricts its liability. Undoubtedly that receipt contains the contract of shipment between these parties, and the whole of it, and both parties are bound by it, unless it contravenes some established public policy. There is no claim that it does so. This contract relieves the transportation company from liability "for the dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier." The argument is, that, under the contract, mere non-delivery of the box to the plaintiffs or their agent does not give a right of action, but that a failure by the company to land the goods on dock or pier is essential to such right. Assuming that this position is well taken (as it probably is), the burden is upon the company to show that the box was so landed. We find no testimony in the record tending to show that the box was removed from the vessel on which it was carried to Milwaukee. All that the bill of exceptions contains on the subject is the statement that the defendant gave testimony on the trial "tending to prove the receipt of the box in Milwaukee, and that it had delivered it to said Stoltz; and upon this question each side produced a number of witnesses." Certainly these statements do not show that any testimony was given tending to prove the box was ever landed from the vessel. Unless, therefore, some material error intervened in the rulings of the court on the trial, the judgment is correct.

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equity will grant a stockholder relief against such gross violations of duty on the part of the officers of a corporation as are stated in the complaint. If the officers are disposed in good faith to discharge their duty to the corporation and its stockholders, they can repair their wrongs by restoring the property which they have unlawfully taken, without waiting to be compelled to do so by a judgment of the court. But to hold that a stockholder has no standing in court, unless he has requested a managing body, who were the wrong-doers, to grant him relief from their fraudulent acts, is extending the general rule beyond all reasonable bounds.

For these reasons, we think the complaint states a cause of action, and that the demurrer to it was properly stricken off as frivolous.

By the COURT. The order of the superior court of Milwaukee County is affirmed.

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**CORPORATIONS—STOCKHOLDER MAY MAINTAIN ACTION AGAINST.**—An individual stockholder may maintain a suit in equity against a corporation to recover damages for depreciation in value of the corporate stock and property caused by the fraudulent conduct of its officers and directors: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note; *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 96 Am. Dec. 95, and particularly note; *Tutwiler v. Tuscaloosa etc. Co.*, 89 Ala. 391. It is not necessary in such an action that the complaint should negative knowledge on the part of the stockholder of the misconduct of the directors: *Horn Co. etc. v. Ryan*, 42 Minn. 196; *Davis v. Gemmell*, 70 Md. 356.

## BROWNING v. GOODRICH TRANSPORTATION Co.

[78 WISCONSIN, 391.]

**CARRIERS.—BURDEN OF PROOF IS UPON A CARRIER** to show that he has complied with his contract, and though his contract exempts him from liability for the "dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier," he must prove that he landed such goods from his vessel.

**CARRIERS ARE PRESUMED TO HAVE BEEN NEGLIGENT WHEN GOODS ARE LOST** and the circumstances of their loss are not explained.

**CARRIERS.—STIPULATION IN A SHIPPING RECEIPT** that certain restrictions of liability therein contained should extend to and inure to the benefit of any other carrier to whom the goods might be delivered for shipment does not, however, protect the latter carrier if it, in receiving the goods, enters into a contract of carriage on its own account from which the stipulation in question is omitted.

**IMMATERIAL ERROR.**—Improper admission of evidence concerning the value

and identity of certain goods is an immaterial error, if the parties have stipulated what the value of such goods is and there is no question of their identity.

*Van Dyke and Van Dyke*, for the appellant.

*Stark and Sutherland*, for the respondents.

LYON, J. The pleadings, the undisputed evidence, and the special verdict establish the facts that the transportation company received the box of clothing in controversy at Chicago for shipment to Milwaukee, and failed to deliver the same to the plaintiffs, who were the owners and consignees thereof; also that the value of the contents thereof was \$231. On these facts, were there no special contract restricting the liability of the transportation company for the loss of the box, there can be no doubt of the right of the plaintiff to recover such stipulated value. But counsel for the transportation company contend that the receipt given for the box at Chicago, by the transportation company, restricts its liability. Undoubtedly that receipt contains the contract of shipment between these parties, and the whole of it, and both parties are bound by it, unless it contravenes some established public policy. There is no claim that it does so. This contract relieves the transportation company from liability "for the dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier." The argument is, that, under the contract, mere non-delivery of the box to the plaintiffs or their agent does not give a right of action, but that a failure by the company to land the goods on dock or pier is essential to such right. Assuming that this position is well taken (as it probably is), the burden is upon the company to show that the box was so landed. We find no testimony in the record tending to show that the box was removed from the vessel on which it was carried to Milwaukee. All that the bill of exceptions contains on the subject is the statement that the defendant gave testimony on the trial "tending to prove the receipt of the box in Milwaukee, and that it had delivered it to said Stoltz; and upon this question each side produced a number of witnesses." Certainly these statements do not show that any testimony was given tending to prove the box was ever landed from the vessel. Unless, therefore, some material error intervened in the rulings of the court on the trial, the judgment is correct.

The judgment may also be upheld on other grounds. The

contract of carriage in exhibit A contains no express stipulation relieving the transportation company from liability for its own negligence, and the non-delivery of the box to plaintiffs — the circumstances of the loss thereof being unexplained — is presumptive evidence of negligence on the part of the transportation company. It was so held in *Black v. Goodrich Trans. Co.*, 55 Wis. 319, 14 Am. Rep. 713, where the question is fully discussed in the opinion by Mr. Justice Taylor, and many cases cited. Such is the settled law of this state.

Some exceptions were taken to the rulings of the court on the trial. Such of them as are deemed material will now be considered. The shipping receipt given by the Baltimore and Ohio Express Company for the box in question at New York contained provisions relieving that company from liability for loss or damage thereto occurring in a variety of ways not necessary to be here enumerated, and restricting its liability to loss or damage caused by its own fraud or gross negligence, and to fifty dollars in case it should be held liable for any such loss or damage. It also contained a stipulation that all the terms of the contract should extend to and inure to the benefit of any other carrier to whom the box might be delivered for shipment to its destination. This, of course, includes the defendant company. It is claimed that the stipulations in such shipping receipt operate to limit the recovery in this action to fifty dollars. The difficulty with this proposition is, that the contract evidenced by such receipt is between the plaintiffs and the express company only. So far as the transportation company is concerned, it was merely a proposition by plaintiffs to that company to carry the box on the same terms the express company had carried it. The transportation company was at liberty to accept it or to make another and different contract of carriage. It chose the latter course, and entered into the contract with plaintiffs contained in exhibit A. This contract was made by the express company as the agent and in behalf of the plaintiffs, and inures to their benefit, and probably would charge them with liability under it, were any claimed and proved. The New York shipping receipt of the express company was offered in evidence in behalf of defendant, and rejected by the court. For the reasons above stated, it failed to show a contract between the parties to this action, and hence was properly rejected.

Objection was made to the admission of certain testimony

offered by the plaintiff for the purpose of proving the value and identity of the goods in the box. The testimony was received. So far as the value of the goods is concerned, that was determined by stipulation, and the testimony thereby became immaterial. The identity of the goods was sufficiently established by the other testimony in the case. Hence if the testimony was improperly admitted it could not have harmed the defendant, and its admission is no ground for a reversal. We find no material error disclosed in the record.

By the Court. The judgment of the circuit court is affirmed.

**CARRIERS—BURDEN OF PROOF.**—Where a bill of lading exempts a carrier from liability for breakage, he must, in an action for damages, first bring himself within the exception: *Witting v. St. Louis etc. R'y Co.*, 101 Mo. 631; 20 Am. St. Rep. 636, and note. The burden of proof is upon a carrier to show that he complied with the terms of the contract of carriage: *Hull v. Chicago etc. R'y Co.*, 41 Minn. 510; 16 Am. St. Rep. 722, and note.

**CARRIERS—EVIDENCE OF NEGLIGENCE.**—Non-delivery of goods at point of destination is presumptive evidence of negligence: *Wheeler v. Oceanic etc. Co.*, 125 N. Y. 155; 21 Am. St. Rep. 729, and note; *Lennon v. Rawitzer*, 87 Conn. 583.

**CONNECTING CARRIERS.**—A connecting carrier, by receiving freight from another carrier, under a contract between the consignor and the latter, becomes the agent of such carrier to complete his contract, and is entitled to the benefit of all valid limitations of the carrier's liability contained in the contract: *St. Louis etc. R'y Co. v. Weekly*, 50 Ark. 397; 7 Am. St. Rep. 104. Compare *Adams Ex. Co. v. Harris*, 120 Ind. 78; 16 Am. St. Rep. 315, and note.

## GOGEBIO INVESTMENT COMPANY v. IRON CHIEF MINING COMPANY.

[78 WISCONSIN, 427.]

**CORPORATIONS.**—IN AN ACTION AGAINST THE STOCKHOLDERS OF AN INSOLVENT CORPORATION to compel them to contribute to the payment of its debts, it is only necessary, in order to make out a *prima facie* case, to establish that they have not in good faith paid the par value for the stock of the corporation.

**CORPORATIONS.**—THE OBLIGATION OF A SUBSCRIBER TO THE CAPITAL STOCK of a corporation to pay a subscription cannot be surrendered or released by the directors. They are bound to call in that which is unpaid, and to carefully husband it when received.

**CORPORATIONS.**—UNPAID SUBSCRIPTION to the capital stock of a corporation is an asset to which its creditors look for payment, and they have the right to insist upon its collection, the same as any other debt due the corporation.

**CORPORATIONS. — THE ISSUANCE OF THE STOCK OF A CORPORATION FOR A WHOLLY INADEQUATE CONSIDERATION** is as much a fraud upon its creditors as though the corporation had disposed of any other debt due it for a wholly inadequate consideration, and a fraudulent holder of stock is liable to the creditors for its par value, less what he has paid for it to the corporation.

**CORPORATION. — SUBSCRIBER FOR STOCK OF A CORPORATION**, whether he is to pay for it in money or in property, impliedly agrees to pay its par value, and so far as the creditors of the corporation are concerned, its directors cannot release him from that obligation.

**CORPORATIONS. — SUBSCRIBER TO THE STOCK OF A CORPORATION, WHO PAID THEREFOR IN PROPERTY** known to them to be worth much less than the par value of the stock received by him, is liable to the creditors of the corporation for the difference between the value of such property and the par value of the stock received therefor.

*Turner and Timlin*, for the appellant.

*H. Nunnemacher, R. Nunnemacher, H. M. Benjamin, and Williams, Friend, and Bright*, for the respondents.

**TAYLOR, J.** This is an appeal from an order sustaining a demurrer to the complaint of the plaintiff in the action. The complaint is intended to set up a cause of action under sections 3216, 3217, 3219, 3221, 3224, and 3226 of the Revised Statutes. The complaint sets forth the fact that the plaintiff is a judgment creditor of the defendant corporation; that execution upon its judgment has been duly issued, and returned unsatisfied. It also alleges that the corporation is insolvent, and unable to pay its debts. The complaint then alleges that Herman Nunnemacher, Robert Nunnemacher, and H. M. Benjamin are stockholders of said defendant company, and sets forth facts which show that they have not paid for their stock its full and fair value, as required by law, so as to relieve them from contributing further to the payment of the debts of said company.

It is not seriously contended by the learned counsel for the respondents that the complaint does not state facts sufficient to show that these defendants are stockholders of said corporation, and that, as between them and the creditors of said corporation, they would be liable to make further payment upon the stock held by them to satisfy the debts of said insolvent corporation; but it is claimed that because it is alleged in the complaint that these stockholders obtained their stock from the corporation as full-paid stock as the purchase price paid by said corporation for certain mining rights sold to said corporation by said stockholders, the plaintiff does not make

out a case against these stockholders, notwithstanding its allegations show that the property transferred to said corporation was not in fact worth one tenth part of the par value of said shares of stock so received by them in exchange therefor, and that such fact was well known to said stockholders at the time they received their shares of stock therefor, unless the plaintiff makes the further allegation that at the time it gave credit to said corporation it was ignorant of the fact as to how said defendants had obtained their shares of stock, and that, relying upon and believing that they had paid full value for their shares of stock, it gave credit to said corporation. The claim is, that the same rule of pleading is applicable to the case at bar as is applicable to an action to recover damages of a defendant for obtaining goods from the plaintiff by false and fraudulent representations made by the defendant for the purpose of obtaining such goods, and that in such case the plaintiff must allege that the representations were false, to the defendant's knowledge, and that the plaintiff relied upon them as true, and gave the credit or made the purchase relying upon the truth of such representations.

We do not think the cases are at all analogous. The case at bar is in the nature of a bill in equity to subject to the payment of debts the property of the defendant, which it has conveyed under such circumstances as the law declares to be fraudulent as against its creditors. In an action against the stockholders of a corporation to compel them to contribute to the payment of the debts of the insolvent corporation it is only necessary, in order to make out a *prima facie* case, to establish the fact that the stockholder has not in good faith paid the par value for his stock to the corporation.

The nature of the stockholder's liability to the creditors of the corporation, when such corporation is bankrupt, is well stated in the cases of *Upton v. Tribilcock*, 91 U. S. 47, and *Sanger v. Upton*, 91 U. S. 60. In the case first cited the court say: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its share-holders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball, to be thrown into the market for the

purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, or promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully husband it when received." In the second case cited the court say: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt of the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

Under the rule stated in these opinions, that the capital stock of a corporation is an asset of the corporation, held in trust for the benefit of the corporation and of its creditors when bankrupt, it follows logically that when the corporation disposes of this stock for a wholly inadequate consideration, it is as much a fraud upon the creditors of the corporation as though the corporation had disposed of any of its other debts due to the corporation for a wholly inadequate consideration. It differs from the other tangible assets of the corporation, as between the creditors of the corporation and the stockholders, in this, that when the tangible assets of the corporation are fraudulently conveyed, the creditor can only take the property so conveyed in satisfaction of his debt, but cannot compel



the fraudulent vendee to pay the creditor's debt unless he has disposed of the property fraudulently received by him, and in that event he must account for what he has received for it, or for its fair value; but the fraudulent holder of stock, under the common law and under our statute, becomes liable to the creditors for the par value of the stock, less what he has paid for it to the corporation. The law makes the fraudulent holder of stock, so far as creditors are concerned, a debtor to the company for its par value, and as to creditors he cannot relieve himself of this obligation until the debts of the corporation are paid. Under sections 1753 and 1758 of the Revised Statutes, which are not, perhaps, materially different from the common law, the subscriber for stock of a corporation, whether he is to pay for it in money or in property, impliedly agrees to pay its par value therefor, and, so far as creditors of the corporation are concerned, the trustees of the corporation cannot release him from that obligation.

In the case at bar the facts stated in the complaint show that nearly all the capital stock of the corporation was issued and delivered to the stockholders named in the complaint for a nominal consideration, and the presumption of the law is, that such a transfer of the stock is a fraud upon the creditors of the corporation, and that as to such creditors the parties to whom the stock was issued must be held liable to a further payment upon their stock to the par value thereof, if it be necessary to make such further payment to satisfy the debts of the corporation. The allegations of the complaint, which are admitted to be true by the demurrer, show conclusively that the stockholder defendants have not, as between themselves and the creditors, paid in full for their stock, and are therefore liable to make further payments for the benefit of the plaintiff as a creditor of the corporation. This is all that is necessary under our statute or at common law to make a case against the stockholder of unpaid stock in favor of a creditor of the insolvent corporation.

That the defendants may be able to defeat this claim of the creditor of the corporation, by showing that at the time his debt was incurred he knew that the stock of the corporation had all been issued in payment for property of a value very much less than the par value thereof, is a question which does not arise on this demurrer. Such a defense is in the nature of an estoppel upon the plaintiff, and need not be negatived in the complaint. All the cases cited by the

learned counsel for the appellant to sustain his contention were cases arising upon the trial of the issues in the case, and not upon a demurrer to the pleading of the plaintiff.

By the COURT. The order appealed from is reversed, and the cause is remanded, with directions to overrule the demurrer, and for further proceedings according to law.

**INSOLVENT CORPORATIONS — LIABILITY OF STOCKHOLDERS.** — For the liability of stockholders to creditors of the corporation for corporate debts, as well as the method of enforcing such liability, see extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-873; *Barrick v. Gifford*, 47 Ohio St. 180; 21 Am. St. Rep. 798, and note 805, 806.

**CORPORATIONS — LIABILITY OF SUBSCRIBERS.** — Subscribers who have paid the full amount of the shares for which their subscriptions call cannot be bound by assessments for any purpose but for debts: *Lancaster Starch Co. v. Moore*, 62 N. H. 671. But subscribers are liable to corporation creditors to the full amount of their *bona fide* subscriptions: *Tama Water P. Co. v. Hopkins*, 79 Iowa, 653; and they cannot set off, as against a judgment creditor of the corporation seeking to subject the unpaid subscriptions due from them to the corporation, the amount of debts owing to them from the corporation: *Tama Water P. Co. v. Hopkins*, 79 Iowa, 653. Where the stock is not subscribed for up to the minimum of the capital, and none of the stock is paid in, but the corporations organize and proceed to business, contracting debts beyond the nominal capital, they perpetrate a legal fraud upon the creditors, and must make good the minimum capital, with interest thereon, if necessary to pay the corporate debts: *Burns v. Beck etc. Hdw. Co.*, 83 Ga. 471. In *Whitehill v. Jacobs*, 75 Wis. 474, where paid-up stock was issued for property received by the corporation, the court held that the holders thereof cannot be charged with a debt of the corporation on the ground that such stock was not in fact fully paid, except in the case of fraud.

## HAGE v. CAMPBELL.

[78 WISCONSIN, 572.]

**PARTNERSHIP. — ASSUMPTION BY A PARTNERSHIP OF A DEBT OF ONE OF ITS MEMBERS** is not a fraud upon the partnership creditors, if the firm is solvent and able to pay its other debts at the time.

**PARTNERSHIP, ASSUMPTION OF DEBT BY.** — The failure to enter on the books of a partnership a credit for moneys alleged to have been loaned, or to give any security for such money, or to make any agreement as to when it should be repaid, are circumstances properly to be considered in determining whether such loan was in fact made, but do not prevent it from becoming a valid partnership debt, if the jury are satisfied that it was made in good faith and without any fraudulent purpose.

**PREFERENCE MAY BE GIVEN BY A FAILING DEBTOR** to any of his creditors, either by paying or securing a debt, and his other creditors cannot, on that account, avoid the payment or invalidate the security.

**PARTNERSHIP.** — ONE PARTNER MAY SECURE A FIRM DEBT, in the absence of his copartner, and without his knowledge and consent, by executing a mortgage in the name of the firm upon its personal property.

**CHattel MORTGAGE — CHANGE OF POSSESSION.** — A mortgagee may employ a mortgagor to remain in possession of chattels mortgaged, and to sell them, and to pay the proceeds of the sale in satisfaction of the mortgage.

**PRACTICE.** — **PROOF OF VALUE IS UNNECESSARY** in an action of trover, when the answer alleges that it is not of greater value than a specified sum, and the recovery was for a sum less than that thus admitted.

*Ray S. Reid and Charles P. Brown*, for the appellant.

*W. Goss*, for the respondent.

COLE, C. J. It would be impossible, without writing a very long opinion, to notice in detail all the errors assigned for a reversal of the judgment in this case, nor is such an extended discussion necessary to dispose of the questions involved. A reference to a few elementary principles of law is all that need be said upon the numerous errors assigned.

The plaintiff's right to recover the value of the goods in controversy depends entirely upon the validity of a chattel mortgage given to him by the Hage Brothers, dated May 3, 1886. If that mortgage is valid as against the creditors of the firm, the judgment is correct. The objection taken to this mortgage is, that it was not given to secure the payment of a partnership debt, and is therefore void as to the firm creditors. We think the jury must have found, under the charge of the court, that the mortgage was given to secure the *bona fide* indebtedness of the firm, and that there was no fraudulent intent in giving it. That there was evidence tending to establish these facts cannot be successfully denied, if the plaintiff's testimony is to be believed; for he testified, in substance, that he loaned Iver Hage six hundred dollars in June, 1884, and that before Christmas, 1885, he loaned both Iver and Torger two hundred dollars more. In June, 1884, Iver and one Canudson were in partnership; and the plaintiff said the six hundred dollars which he loaned Iver Hage was used by them to purchase goods for the firm. It does not clearly appear that Iver made the loan of six hundred dollars for the firm of Hage and Canudson, though probably the loan inured to the benefit of the firm. The plaintiff does say that Canudson had nothing to do in borrowing the six hundred dollars from him; by which he means, as we understand his testimony, that Canudson did not act in the matter. This, of course, might be true, and

still it might be the fact that Iver acted for the firm in making the loan. It satisfactorily appears that the firm had the benefit of the loan, and that the money was applied to purchase goods for the firm. But, it is said, *non constat* but this six hundred dollars was Iver's contribution to the capital stock of the partnership.

But the matter as to whether this debt was one that the firm was liable to pay does not rest upon the facts above stated. It appears that in the spring or summer of 1885, Torger Hage purchased the interest of Canudson in the firm, and that then he and Iver both promised to pay the plaintiff the six-hundred-dollar loan. Now, if it be assumed that the six hundred dollars was originally loaned to Iver, and that it was his individual debt, yet as the money had been used to purchase goods for the firm, could not the partners, when the new firm was organized, assume this debt, and bind the firm to pay it? There is nothing to show that the firm was insolvent at this time, and we suppose it might bind the firm to pay the individual debt of one of the partners. We do not understand that such an application of the assets, or such a liability assumed, would be a fraud upon partnership creditors, if the firm was solvent and able to pay its other debts at the time. The learned circuit court distinctly charged that if the debt was the individual debt of Iver Hage, it must have been assumed by the partnership, so as to become a firm liability, in order to sustain the mortgage which was subsequently given. But that a solvent firm might assume the individual debt of one of the partners, and agree to pay it out of the partnership property, and give a valid mortgage on its stock for that purpose, providing the transaction was free from fraud, is clear. So that if, at the time the new firm was organized, the debt became a partnership liability by the firm's assuming it and agreeing to pay it, then the claim stood upon the same footing as any other firm debt. This is not the language of the charge, but is its meaning, and the sense in which the jury must naturally have understood it.

It seems to us the court was right in this view of the law. There can be no doubt that the jury were satisfied from the evidence that when the new firm was organized this six-hundred-dollar loan was assumed by the firm and became the partnership debt of Hage Brothers; and it is not claimed that the firm was insolvent at that time. If the firm was in-

solvent, it could not assume the individual debt of a partner and secure its payment by a mortgage upon the partnership property, as such an act would be in fraud of the partnership creditors, who had the right to be first paid, and so the jury were instructed.

As to the two hundred dollars which the plaintiff loaned Hage Brothers about a month before Christmas, in 1885, there can be no question but that it was a partnership debt. It is argued that if the six-hundred-dollar loan had in fact become a partnership debt, the books of Hage Brothers should have shown a credit for that amount in favor of the plaintiff, or that a note or some security should have been given the plaintiff as evidence of the firm liability. Correct business methods would doubtless have required some entry of the transaction upon the books of the firm, but the business seems to have been done very loosely, the parties having confidence in each other, and trusting to the oral agreement. It does not appear that there was any entry made of the two hundred dollars on the firm books, or any note given for it, though unquestionably it was a loan to the firm of Hage Brothers. The court instructed the jury that the facts that the books of Hage Brothers did not show a credit in favor of the plaintiff for his money loaned, and that no note was given nor security taken, nor agreement made as to when the money was to be repaid, were circumstances to be weighed when considering the credibility of the plaintiff's testimony. These were proper matters to be considered in determining the question as to whether the debt was a valid partnership liability, or whether the chattel mortgage was given for any fraudulent purpose.

The mortgage was given, as we have said, on the 3d of May, 1886. At that time the firm of Hage Brothers was embarrassed and in failing circumstances. But the mortgage was given by one partner in the absence of the other partner, to secure an existing firm liability. Could not such a security be given to secure an honest *bona fide* debt, where there was no intent to cover up property for the benefit of Hage Brothers, or to defraud their other creditors? We suppose the plaintiff had the right to take the mortgage and secure himself, even though the other creditors might suffer by his doing so. One creditor has the right to induce a failing debtor to pay or secure his debt, and the fact that they might lessen the ability of the debtor to pay other creditors does not neces-

sarily avoid the payment or invalidate the security. The mortgage was given to secure the payment of \$910.61, the amount of the firm debt, and the property mortgaged was not worth much more than that sum.

There is an objection that the property was not sufficiently described in the mortgage, but we think the objection is not well taken. The schedule referred to, and attached to the mortgage, clearly identifies and describes the property embraced in the instrument. It does describe the articles in the show-cases with sufficient fullness to indicate what property was intended to be covered by the mortgage.

The mortgage was given by Torger Hage on behalf of the firm, in the absence and without the knowledge of the other partner, Iver Hage, who was absent in Dakota. We suppose one partner may, without the consent of his copartner, being absent, pay a debt or execute a mortgage in the name of the firm upon partnership property to secure a firm debt. The power of each partner to bind the firm fairly extends to such a transaction, unless restricted by the articles of copartnership, and it does not appear that there was any such restriction on the power of the partner in this case. It was clearly within the scope of the implied authority of Torger to execute the mortgage, as much as selling the goods or collecting the debts due the firm. This proposition seems too plain to require discussion.

The mortgagee, deeming himself insecure, took possession at once of the mortgaged property, as he had the right to do, and employed Torger, as agent or clerk, to sell the goods and pay over the proceeds to him, to be applied upon the mortgage debt. There is no legal objection to such an arrangement. It certainly did not create any secret trust, as counsel suggests. The plaintiff might employ the mortgagor to sell the goods for him, and pay over the proceeds of all sales made.

The action is for a wrongful conversion of the goods, alleged in the complaint to be of the value of \$1,147.41. The defendant, as sheriff, seized the goods under attachments issued in favor of the creditors of the firm of Hage Brothers. In the answer the defendant denies that the goods were "of any other or greater value than \$917.63." This, fairly construed, must be deemed to refer to the mortgaged property mentioned in the complaint. A point is made that the value of the property was not proven on the trial. It certainly appears that

the property did not exceed the amount due upon the note and mortgage, and, in view of the admission in the answer as to the value, we think no further proof as to that fact was necessary. The recovery was less than the value stated in the answer, and the interest thereon to the commencement of the action.

This disposes of all the material questions. The case seems to have been fairly submitted, under proper instructions as to the law for the guidance of the jury, and the judgment of the circuit court must be affirmed.

By the COURT. Judgment affirmed.

**PARTNERSHIP — ASSUMING DEBT OF ONE PARTNER.** — While the general rule is, that one partner cannot use firm assets to discharge his individual liabilities: *Janney v. Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460, and note; *Fecht v. Evans*, 52 Ark. 556; yet a firm may, by consent, assume or pay off the individual indebtedness of one of its members: *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530, and note 533-537; *Seigel v. Chidsey*, 28 Pa. St. 279; 70 Am. Dec. 124; *Miller v. Stone*, 69 Wis. 617; or the debts of a former firm composed partly of the same persons: *Herman v. Paris*, 81 Cal. 625. Without the consent of the firm, it cannot be bound by contracts of indebtedness entered into by one of its members upon his own account, notwithstanding the fact that the goods purchased or the moneys borrowed by such member are subsequently used for firm purposes: *National Bank v. Meader*, 40 Minn. 325; *Leverone v. Hildreth*, 80 Cal. 139. A mortgage given by an insolvent firm to secure money loaned to a member thereof is void as against the firm creditors: *Cribb v. Morse*, 77 Wis. 322. But see *Bernheimer v. Rindskopf*, 116 N. Y. 428; 15 Am. St. Rep. 414; *Hanover Nat. Bank v. Klein*, 64 Miss. 141; 60 Am. Rep. 47.

**DEBTOR AND CREDITOR — PREFERENCES.** — An insolvent partnership may make preferences among creditors of the firm, and one partner, even without the knowledge or consent of his copartners, may transfer the partnership property to a firm creditor in satisfaction of his debt: *Bulger v. Rose*, 119 N. Y. 459. Compare *Patton v. Leftwich*, 86 Va. 421; 19 Am. St. Rep. 902, and note.

**CHATTEL MORTGAGES — CHANGE OF POSSESSION.** — A chattel mortgage is not void as to creditors, which allows the mortgagor to retain possession of the mortgaged property and sell the same in the usual course of business, under an express provision requiring that the profits must be applied to the satisfaction of the mortgagee's debt: *Stinis v. Dodge*, 121 N. Y. 671; *Huschie v. Morris*, 131 Ill. 587. Compare *Peabody v. Landon*, 61 Vt. 318; 15 Am. St. Rep. 903, and note 912-917.

## HIGGINS v. MINAGHAN.

[78 WISCONSIN, 602.]

**JURY TRIAL.** — IT IS IMPROPER, ON AN EXAMINATION OF A JUROR ON HIS VOIR DIRE, to permit him to be asked whether he had a prejudice for or against *charivari* parties, or against persons engaged in *charivaring*, though the action is to recover damages for the shooting of the plaintiff while he and others were engaged in giving the defendant a *charivari*.

**JURY TRIAL.** — PREJUDICE AGAINST A CRIME. — JUROR IS NOT DISQUALIFIED from trying a person accused of a particular crime by the fact that he has a prejudice against such crime.

**CHARIVARI PARTY, RESISTANCE TO.** — It is error to charge a jury, in an action to recover damages for being shot at a *charivari* party, that defendant was bound to inform such party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting and otherwise, to drive them away. It is not true that one who is being *charivari*ed for the third time by persons who on the previous times were warned away and directed to desist, and who then treated such warning with derision, and abusive and insulting remarks, has no right to fire into a body of rioters without notice and without commanding them to disperse.

**JURY TRIAL.** — IT IS ERROR NOT TO CHARGE A JURY OF THE ESSENTIAL DIFFERENCE between an assault by one person and by a body of rioters, in an action to recover damages for being shot by one whom the plaintiff and others were *charivaring* in a riotous manner, firing guns, blowing horns, drumming on pans, and making all kinds of hideous noises.

**RIOT, RESISTANCE TO.** — A RIOT IS ALWAYS REGARDED IN LAW AS A DANGEROUS OCCURRENCE, and it is impossible to conjecture or ascertain beforehand to what extremities of lawlessness or crime the excitement or confusion may lead. A private person, who cannot otherwise suppress or defend himself from rioters, may justify or excuse the use of fire-arms or other deadly weapons, because it is both a right and a duty to protect one's self and family and to aid in preserving peace.

**SELF-DEFENSE.** — One assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or of suffering great bodily harm, is justified in defending himself, although the danger is not real, but apparent only. A person will not be held responsible, civilly or criminally, if he acts in self-defense from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger.

*Maurice McKenna and L. J. Nash*, for the appellant.

*Duffy and McCrory, and C. E. Shepard*, for the respondent.

COLE, C. J. We have had occasion heretofore to consider the transactions which gave rise to this action: *Higgins v. Minaghan*, 76 Wis. 298; *Minaghan v. State*, 77 Wis. 643. It is a matter of regret that the cause was not fairly tried at the last time, so as to stop this expensive litigation, which is ruinous to both parties, however it might finally result. But



we think such error intervened on the trial that there must be a reversal of the judgment.

The first error assigned which we shall notice was the manner of selecting the jury. On the *voir dire* the plaintiff's counsel was permitted to ask, against the objection of the defendant, whether the juror had any prejudice for or against *charivari* parties, or if he entertained any prejudice against parties that engaged in *charivaring*. The learned circuit judge seems to have had some doubt about the propriety of this course of examination, and we think it was wholly wrong. Every good, law-abiding citizen must and does condemn such unlawful and riotous assemblies. They are wholly indefensible in law and morals, and are reprobated by every well-disposed person. With the same propriety a juror called upon to try a man charged with a criminal act might be asked if he had or entertained any bias or prejudice for or against crime or criminals. Persons are undoubtedly entitled to a fair and impartial jury to try a cause; and where it appears that a juror is prejudiced, of course, upon a knowledge of the facts, or that he has bias or prejudice in favor of or against one of the parties, he is disqualified. But if he has no actual bias, and is able to hear the evidence and decide upon it impartially, under the guidance of the court as to the law, whatever may be his views as to the enormity of crime in the abstract, he is legally qualified as a juror. Such a juror will try the issues fairly and without prejudice to the substantial rights of either party. The course of the examination as to the competency of the jurors we deem irregular and wrong. It resulted in excluding at least one qualified juror (De Smith) from the panel. We do not understand that a prejudice entertained by a juror against a particular crime constitutes a sufficient ground for excluding him when called to try a person for such offense: See *Williams v. State*, 3 Ga. 453; *Parker v. State*, 34 Ga. 262; *United States v. Noelke*, 17 Blatchf. 554; 1 Fed. Rep. 426; *United States v. Hanway*, 2 Wall. Jr. 189. It would be almost impossible to obtain a panel in a case if every citizen was excluded from it who had a prejudice against or was opposed to *charivari*, which is in law a crime.

But, while we express our emphatic disapproval of the course pursued in the examination of the jurors on the *voir dire*, we do not reverse the judgment on that ground, but because the cause, we think, was not fairly submitted to the jury

by the trial court. A number of instructions were asked on the part of the defendant, some of which were covered by the general charge; and some were refused which should have been given. The instructions and charge are too lengthy to be quoted *verbatim*, nor is it necessary, to make our remarks upon them intelligible. The really controverted question in the case was, whether, under the circumstances, the defendant was justified in shooting the plaintiff as he did. The trial court, in considering the question whether the shooting was excusable or justifiable, said: "The defendant, as he had a lawful right to do, on the fourteenth day of June, married a second wife and took her to his home to live. On the night of June 18, 1887, the plaintiff and others, men and boys, proceeded to the defendant's house, and engaged in what is designated as a *charivari*, the nature and character of which is shown by the evidence. The same thing was repeated on the nights of the 22d and 25th of the same month. It was continued on the last night until the plaintiff was shot, when the crowd dispersed. What was done on each night is for you to ascertain and consider. The plaintiff was present on the 18th and 25th of June, as an actual participant, or aiding and encouraging the others, so that he is responsible for the acts, language, and conduct of each and every one constituting the *charivari* party, the same as if done by himself. He knew what had been done on the night of the 22d, before the commencement of the proceedings and disturbance on the 25th. The defendant, at these times, was in the peaceable pursuit of his own business, at home with his family, and entitled to enjoy domestic peace and tranquillity, without disturbance or molestation from the plaintiff or any one else. These three gatherings by the plaintiff and others were composed of men and boys from the defendant's neighborhood, but whether he knew who they were at these times is, of course, a question for you to determine. The *charivari* parties consisting of the crowd in front of or upon the defendant's premises constituted an unlawful assembly; and by their transactions, conduct, and behavior became what is known in the law as a 'riot,' tending to the disturbance of the peace and the annoyance, if not the terror, of the defendant and others in the vicinity; they were trespassers in the highway. Where an unlawful assembly and riot, like the one in question, offers and threatens violence to persons or property, it may and ought to be repelled with suitable and necessary force; but,

where no violence is offered or threatened to person or property, no one is justified in unnecessarily or wantonly killing or wounding a person engaged in a *charivari*. The law provides a punishment for such unlawful acts. Persons thus engaged are not necessarily outlaws beyond the protection of the law, who may be slain or wounded without cause by any person not in any actual or apparent danger from their acts. To enable you to determine whether violence was offered, danger to person or property was threatened or contemplated, the numbers in these unlawful assemblies, and their acts and transactions, proceedings and conduct, on the three nights in question, may be considered on the question of whether the defendant was justified in doing what he did, if he shot the plaintiff in the leg. . . .

"In case you are satisfied from the evidence that the defendant shot the plaintiff in the leg, your next duty will be to determine whether such shooting was excusable or justifiable. Every one has the right to protect himself and his family from danger to life or limb, and his home from invasion by the felonious acts of others. He may employ suitable and appropriate means and methods to prevent or avoid the threatened danger. Before force can be resorted to, there must be real or apparent danger, and an apparent necessity of using force to avoid or prevent an injury. One instance is, where one person attempts a battery of another, in which case the latter is not obliged to submit until an officer can be found or a suit commenced, but he may oppose violence to violence, and the limit to this privilege is only this: that he must not employ a degree of force not called for in self-defense; he must not inflict serious injuries in repelling slight injuries, nor take life, unless his life or limb is in danger. Where he exceeds the limit of necessary protection, and employs excessive force, he becomes a trespasser himself, and his assailant may recover damages from him for repelling the assault with a violence not called for. As mere words never constitute an assault, neither will they justify the employment of force in protection against them, however gross, obscene, or abusive they may be. There are, probably, exceptions to this general statement, in words grossly insulting to females, — at least, where one would be excused, where grossly vulgar and insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force. Such force as one may employ in his own defense he may also em-

ploy in the defense of his wife, his child, or any member of his family; but to revenge the wrongs of himself or his family is no part of his legal right, and where the danger is repelled, or there is no real or apparent danger, justification for the further use of violence is at an end. The force or means to be employed in self-defense of person or family must be such only as are reasonably necessary to repel or prevent the threatened injury. . . .

"If the noise, disturbance, and disorderly acts of the *charivari* party so affected the wife and children of the defendant that he had reasonable grounds to apprehend that either of them was likely to die, or to be seriously injured in body, mind, or health, if such acts were continued, and reasonable cause to believe that such injury might result, then the defendant had the right to use the necessary force to avert the apprehended danger, the same as though an actual attack had been made on their persons; but if the sole and only danger to be apprehended was the injury to his wife and children from fright or terror, then if the defendant, with reasonable safety to himself, could have approached near enough to have informed the *charivari* party of this fact, he should have done so, and given them an opportunity to desist, before firing into the crowd; he should have used all reasonable and practicable efforts which he could use, without exposing himself to danger, to let them know the situation and danger to his family from their acts; but if the acts and conduct of the *charivari* party were of such a character that it would have been impracticable or dangerous to himself or his limb to have gone near enough to have given them this information, then he would be excused from so doing. If alone, and, in addition to danger to his wife and child from fright or terror, there was imminent danger of a felonious attack on his house, or on its inmates or himself, no notice to the *charivari* party of such danger to his wife or child would be necessary; but it would be for you to find whether he is excusable or justifiable in firing, at the time and manner he did, under all the circumstances of the case. The shooting or killing of another is justifiable when committed by any person in either of the following cases."

Now, in respect to this charge, we remark,—1. That what is said in it about justifiable homicide was calculated to mislead the jury from the real issue. The defendant did not

kill any one, and there was no occasion to define justifiable homicide, for no such question was in the case.

2 We do not think the defendant was bound to notify the *charivari* party that their shooting, noise, and tumult were causing terror and fright to his wife and children, and were seriously injuring them in mind, body, and health. This was the third night these persons had been engaged in these unlawful and criminal proceedings. On the first night they came, the defendant had warned them away, and directed them to desist. The rioters themselves knew, or should have known, that their acts and conduct about the house, in the night, were well calculated to produce terror and fright, and injuriously affect the defendant's family. This was the direct, necessary, and almost inevitable consequence of their acts. If the defendant had again requested them to desist and go away,—had told them they were causing serious bodily harm to his wife and children,—his notice and warning would probably have been received with derision, insulting remarks, and vile abuse, as they had been on previous occasions. So we think it was error to charge that the defendant was bound to inform the *charivari* party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting or otherwise, to drive them away. The circuit judge evidently held that the defendant had no right to fire into the body of rioters without notice and without having commanded them to disperse; but upon the undisputed facts of the case, the law imposed upon him no such duty.

3. We think the charge is faulty because it did not point out to the jury the essential difference between an assault by one person and by a body of rioters. An assault in the latter case always inspires more terror, and is attended with greater danger than in the former; for, as defendant's counsel says, when a number of men combine to do an unlawful act, a kind of emulation is excited which leads one after another to go to greater and greater excesses, and to resort to more flagrant acts, so that a person assaulted by a mob in that way is necessarily, from the nature of the case, subject to greater terror and apprehension than when the assault is made by an individual, and the assaulted party may act with more promptness and resort to more forcible means to protect himself and suppress the riot than in the latter case. Here the rioters were firing guns, blowing horns, drumming on pans, and making

all kinds of hideous noises (*Higgins v. Minaghan*, 76 Wis. 301), and kept up this tumultuous uproar for hours, until his wife and youngest daughter were nearly frightened to death. The defendant could not tell when they would attack his dwelling-house, or shoot him, or personally assault him; and in the excitement and confusion the law would justify or excuse him in the use of fire-arms for the safety of himself and family, when such means might not be resorted to in the case of an assault by an individual.

This idea, or difference between an assault by one and by a large number, is embraced in the eleventh and twelfth and some of the other instructions asked by the defendant, and the point should have been clearly and emphatically impressed upon the minds of the jury, for the difference is great, and common experience teaches that the danger to life and property is immeasurably greater in one case than in the other. The trial court should have charged, in the language of the eleventh request, or in some equivalent language, that "a riot is regarded in law always as a dangerous occurrence, because when rioters have convened in a tumultuous and disorderly manner, and have actually begun to accomplish an unlawful act, to the terror or disturbance of others, the prompting of one rioter is contagion to another, and it is impossible to conjecture or ascertain beforehand to what extremities of lawlessness or crime the excitement and confusion may lead. . . . A private person, who cannot otherwise suppress them or defend himself from them, may justify or excuse the use of fire-arms or other deadly weapons, because it is both a right and a duty to protect one's self and family, and to aid in preserving the peace."

We see no objection to the charge where the jury were directed: "If a person is assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real,—only apparent. Such a person will not be held responsible civilly or criminally if he acts in self-defense, from real and honest convictions induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger. A person need not be in actual imminent peril of his life or of great bodily harm before he may shoot his assailant; it is sufficient if in good faith he has reasonable ground from the facts, as they appear to him at the time, to apprehend a design to

commit a felony, or to do some great personal injury, and reasonable cause for believing that there is imminent danger of such design being accomplished."

We do not deem it necessary to comment further on the charge. We think the case was not submitted to the jury upon proper instructions, and that there must be a new trial, for that reason.

By the COURT. The judgment of the circuit court is reversed, and a new trial ordered.

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A CASE VERY SIMILAR TO THE PRINCIPAL CASE IS *Patten v. People*, 18 Mich. 314, 100 Am. Dec. 173, cited in a note to *State v. Patterson*, 12 Am. Rep. 213, in which it was held that the conduct of defendant towards a riotous assemblage about his dwelling-house is excused to the same extent as if the danger thereby to his mother's life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. If he had used such reasonable means to repel the attack as would occur to a humane man, he might resort to forcible means, even with a dangerous weapon, and if such means resulted in the death of any of the party, the homicide is excusable. Substantially to the same effect is the case of *State v. Adams*, 78 Iowa, 292.

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## IN RE MEYER.

[78 WISCONSIN, 61A.]

**BANKRUPTCY OF MAKER AND INDORSER — DIVIDENDS AGAINST ESTATES OF BOTH.** — If both the maker and indorser of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not, in any event, be permitted to exceed in the aggregate the amount of the note.

*Hooper and Hooper*, for the appellant.

*Ryan and Merton, G. D. Van Dyke, C. E. Shepard, E. S. Bragg, and Colman and Sutherland*, for the respondents.

TAYLOR, J. In the above-entitled actions the assignee has appealed from an order made in each of said cases upon the proof of the several claims of the respondents against the estates in the hands of the said assignee. The claim in each case is made upon a promissory note held by the respondent. The notes were made by the Fond du Lac Furniture Company, a corporation doing business in Fond du Lac, and were indorsed by said Charles J. L. Meyer personally. The notes

remain unpaid, and the holders of the notes have taken the proper steps to charge said Meyer as indorser of the same. After said notes became due, and after said indorser had been duly charged as the indorser upon each, both the furniture company and Meyer became insolvent, and each made an assignment under the statute, and in each case an assignee was duly appointed and qualified. The respective holders of said notes proved their claims for the whole amount of the notes against the estate of the furniture company. To this no objection was made. They then severally offered to prove, and the court permitted them to prove, their claims for the whole amount of said notes against the estate of Charles J. L. Meyer. To this the assignee of the estate of Meyer objects, and insists that the proofs of the claim against the estate of Meyer should not be for the whole amount due on the notes, but should be proved conditionally, and that the claim proved and entitled to a dividend in the Meyer estate should, before a distribution of said estate, be reduced by the full amount of any dividend or dividends which may be received, or which the claimants may be entitled to receive, on said notes from the estate of the furniture company. In other words, that the claim proved in the Meyer estate, upon which the holders of the notes should receive a dividend from the estate, should be first reduced by the full amount of dividends received from, or which the claimants may become entitled to receive from, the furniture company. The learned circuit court rejected this claim on the part of the assignee to have the amount of the claim against the Meyer estate, upon which a dividend in that estate should be calculated, ultimately reduced as contended for by the assignee. This appeal is made for the purpose of settling the rights of the creditors having the claims above stated, as well as the rights of other creditors similarly situated in relation to said insolvent estates. Some objection was made as to the appealability of the orders, but as most of the attorneys interested in sustaining the ruling of the circuit judge made no objection of that kind, we shall consider the appeal upon its merits.

The question is this, Can a man who holds a promissory note against the maker and an indorser thereon, after the same becomes due, and after the indorser has been duly charged with payment of the note, and when, before any payment has been made thereon by either maker or indorser, the maker and indorser each make a voluntary assignment for the bene-



fit of their creditors, prove his claim against the estate of the maker and of the indorser severally for the whole amount due on such note? The question is so well settled by the authorities that it is not controverted by the learned counsel for the appellant in this case. That the holder of the note is the creditor of each severally for the whole amount due on the note is uncontroverted, all courts holding that he may bring separate actions upon the note against the maker and indorsers for the whole amount due, and have several judgments for that amount: *Cowles v. McVickar*, 3 Wis. 725; *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383; and that he may pursue his remedy upon such judgments until his debt is fully satisfied, and that if he can obtain satisfaction of such debt by enforcing the judgment against the indorsers alone, he may do so without any hindrance. The indorser himself has no right, in law or equity, to compel his creditor to enforce payment for any part of the judgment out of the assets of the maker before enforcing payment from him. I do not understand the learned counsel for the appellant to dispute this proposition. If we rightly understand his contention, it is this: that after both parties to the note become insolvent, and the estates of each are transferred to an assignee, the other creditors of the assignee of the indorser have, in equity, the right to insist that the holder shall first pursue his remedy against the maker, and recover what he can from the assets of the maker, and that the amount so recovered must be applied as so much paid on his debt; and that as against the estate of the indorser, as between himself and the other creditors of such indorser, he can only have a dividend upon the amount remaining unpaid after so applying what has been realized from the estate of the maker. Perhaps the contention of the learned counsel does not go to this extent, as he need not upon the facts of this case. He, perhaps, does not intend to insist that the holder of the note must pursue his remedy against the estate of the maker in the hands of the assignee before claiming a dividend for the whole amount of the note against the estate of the indorser; but he does contend that if he proves his claim against the maker, and obtains a dividend against that estate, the amount of such dividend must be deducted from the amount due on the note, and he can only have a dividend upon the amount of the note, less the dividend awarded to him from the estate of the maker. The contention is, in short, that any dividend

awarded to the holder from the estate of the maker must be treated, so far as the creditors of the indorser are concerned, the same as a payment made on the note by the maker before the assignments were made, or before the holder made his proofs of claim against the estate of the indorser.

The learned counsel says: "We all agree that if the maker pays any part of the sum due on the note before the assignments are made, or even before the parties prove their claims against the several estates, the holder can only prove in either estate for the amount remaining unpaid on said note, and consequently can only have a dividend in either on the sum remaining unpaid." And he asks why he should have a dividend on the whole amount, especially against the other creditors of the indorser, because such payment is obtained from the estate of the maker after the proofs of claim are made against that estate. The learned counsel for the appellant admits that the distinction he suggests has been made by most of the courts in this country and in England, where some different rule has not been established by statute law, and that the great weight of authority is against the rule he contends for; but, as he says, it is a new question in this court, and if there be no good sense or reason for the rule, we ought to repudiate it and establish the rule he contends for. If it be as the learned counsel contends,—that there is no sense or reason for the rule,—we ought not, perhaps, to follow it. But before we determine that the rule is not founded on reason or good sense, we must give due weight to the fact that the most learned judges and courts in this country and in England have established the rule, and they insist that it is founded on right, reason, good sense, and upon well-established principles of equity. It certainly becomes us to give due weight to the opinions of these learned judges and courts, and to be absolutely satisfied that they have for so many years been violating reason and good sense, before we determine to set aside their reasoning and establish a new rule which, in our opinion, is based on good sense and sound logic. The following list of authorities, with many others not cited, sustain the ruling of the circuit judge that the holder of a note may prove his claim for the whole amount due on it at the time the claim is proved against the estate of the indorser, and that the fact that the holder may have also proved his claim against the maker, and that he may be entitled to or has received a dividend from the estate of the maker after such proof against the indorser, does not affect

his right to receive a dividend against that estate upon the full amount of his original claim: *In re Bates*, 118 Ill. 524; 59 Am. Rep. 383; *Morrison v. Kurtz*, 15 Ill. 193; *Sweet v. Redhead*, 76 Ill. 374; *Brown v. Cozard*, 68 Ill. 178; *Findlay v. Hosmer*, 2 Conn. 350; *West v. Bank of Rutland*, 19 Vt. 403; *Morris v. Olwine*, 22 Pa. St. 441; *Miller's Estate*, 82 Pa. St. 113; 22 Am. Rep. 754; *Graeff's Appeal*, 79 Pa. St. 146; *Putten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479; *Citizens' Bank v. Patterson*, 78 Ky. 291; *Brown v. Merchants' & F. Nat. Bank*, 79 N. C. 244; *Moses v. Ranlet*, 2 N. H. 488; *Walker v. Baxter*, 26 Vt. 710; *In re Souther (Ex parte Talcott)*, 2 Low. 320; *Allen v. Danielson*, 15 R. I. 480; *Sohier v. Loring*, 6 Cush. 537; *Fuller v. Hooper*, 3 Gray, 334; *People v. Remington*, 121 N. Y. 328; 1 Story's Eq. Jur., sec. 640; Jones on Pledges, sec. 587; *Southern Mich. Nat. Bank v. Byles*, 67 Mich. 296; Sheldon on Subrogation, sec. 182; *In re Hobson*, 81 Iowa, 392; *Allen v. Herrick*, 15 Gray, 275, 289; *Blake v. Ames*, 8 Allen, 318; *National M. W. Bank v. Porter*, 122 Mass. 308; *In re Hicks*, 19 Nat. Bank. Reg. 299; *In re Hamilton*, 1 Fed. Rep. 800; *Ex parte Talcott*, 9 Nat. Bank. Reg. 502; *In re Baxter*, 18 Nat. Bank. Reg. 497; *Lewis v. United States*, 92 U. S. 618; *Evertson v. Booth*, 19 Johns. 486. English cases in chancery: *Kellock's Case*, L. R. 3 Ch. 769; *Greenwood v. Taylor*, 1 Russ. & M. 185; *Mason v. Bogg*, 2 Mylne & C. 448.

As said above, the learned counsel for the appellant does not claim that the indorser can enforce the rule contended for by him, for his own benefit, as that would be in direct conflict with the rule, which is admitted by all parties, that the holder of the note may, at his option, enforce his remedy against both or either debtor for the whole amount of his claim, until he obtains full satisfaction therefor: See Story's Eq. Jur., sec. 640, and cases cited. The claim is proved in favor of the creditors of the indorser, and the counsel claims to invoke, in favor of his other creditors, the rule which, under certain circumstances, will compel a creditor having security for his debt upon two or more collateral securities, in favor of a creditor of the same debtor having security on only one of such collaterals, to exhaust his remedy in the first place against the collaterals upon which the other creditor has no security: Story's Eq. Jur., secs. 633-635. But courts do not apply this rule when its enforcement will be a detriment to the party having the double security; and we do not think the rule has ever been enforced when the double security which the one creditor

holds (not held by the other) is simply the personal responsibility of a third person, who is debtor for the amount of the same claim: Story's Eq. Jur., secs. 642, 643. Judge Story says: "But although courts of equity will thus administer relief to both parties in cases of double funds which are subject to the same debt, and will, in favor of sureties, marshal the securities for their benefit, yet this will be so done in cases where no injustice is done to the common debtor, for then other equities may intervene. And the interposition always supposes that the parties seeking aid are creditors of the same common debtor; for if they are not, they are not entitled to have the funds marshaled in order to leave a larger dividend out of one fund for those who can claim only against that. This principle may be easily illustrated by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the several creditor obtains a subsequent judgment against his own several debtor, a court of equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor. At least it will not do so unless it should appear that the debt, though joint in form, ought to be paid by one of the debtors only, or there should be some other supervening equity": *Ex parte Kendall*, 17 Ves. 520; *Dorr v. Shaw*, 4 Johns. Ch. 19. In the case of *Ex parte Kendall*, 17 Ves. 520, Lord Eldon says: "But it was never said that if I have a demand against A and B, a creditor of B shall compel me to go against A, without more. . . . If I have a demand against both, the creditors of B have no right to compel me to seek payment from A, if not founded on some equity giving B the right, for his own sake, to compel me to seek payment from A. . . . It must be established that it is just and equitable that A ought to pay in the first instance, or there is no equity to compel a man to go against A, who has a resort to both funds."

In the case at bar, therefore, the other creditors of Meyer have no larger equities against the creditors of Meyer and the furniture company than Meyer himself has or would have if he were prosecuting this appeal.

It is admitted that if the debtors, Meyer and the furniture company, were not insolvent, or if they had not made assignments, the common creditor might prosecute his claim against

either or both to judgment and satisfaction, and that a court of equity would not interfere to prevent such a result. Certainly it would not interfere to prevent a satisfaction of the entire claim, if either or both parties had sufficient assets to satisfy the same. Why, then, should a court of equity interfere to prevent the satisfaction of the common creditor's debt out of the estates of his debtors in the hands of their respective assignees, if the dividends upon the whole amount of such claim proved against each estate will produce such satisfaction? or why is his debt against the indorser any less sacred than the claim against the maker? It may have been, and in the case at bar it is probable, that the common creditor relied fully as much upon the credit of the indorser as he did upon that of the furniture company, when discounting the notes which constitute his claim. Why, then, should a court of equity interfere in a way which would result in giving the common creditor less than his proportionate share of both estates upon the basis of a debt due from each insolvent to the full amount of his claim? Under the rule contended for by the learned counsel for the appellant, if each estate would pay a dividend upon all the debts proved against it of fifty per cent, the common creditor would get but seventy-five cents on the dollar, and if the rule established by the circuit court prevails, he would get his pay in full.

But the learned counsel for the appellant asks why a party should have a dividend upon money he has in his own pocket. The answer which is given to this in most of the cases is, that the sums upon which the parties are entitled to dividends are the sums due them from the estate at the time of their making the proofs of their claims. It cannot be said that the money he afterwards receives from the estate of the maker is money paid to him on his claim against the indorser, so as to affect his right to a dividend upon the full amount due from the indorser at the time he proved his claim against him, so long as a dividend upon his full claim against the estate of the indorser, added to the dividend from the estate of the maker, will not more than pay his debt in full. When the indorser became insolvent, the claim of the holder of the note against him for the whole amount due thereon was just as legal and equitable as that of the sole creditor of such indorser; and it would seem inequitable that he should not be able to share equally in that estate upon the basis of his entire claim because he has

sought to recover a part of the same from the maker. So long as all the dividends in both estates do not more than pay his debt, to apply the money so received from the estate of the maker would work a benefit to the other creditors of the indorser and an injury to the common creditor.

It would seem to be imposing too great a task upon us to cite the multitude of cases in which the rule of the court below has been acted upon, and vindicate their reason and logic by quotations from their decisions, and we content ourselves with saying that, in our judgment, the rule is neither inequitable nor unjust; and if some of the reasons in some of the multitude of cases holding to the rule are not sound or logical, we think there are abundant reasons which are sound and logical sustaining the rule.

The rule adopted by the learned circuit judge seems to be in exact accord with the rule in cases of bankruptcy in England, in all cases in which the creditor has only the personal promise of his several debtors for his security. Archbold, an eminent law-writer, says: "As at law, the holder of a bill may, upon due notice of dishonor, sue concurrently and recover judgment for the full amount, and levy execution from every party to the bill till he have recovered the sum due on the bill. So in bankruptcy, he may prove against every party, if they are all bankrupts, or prove against those of them who are bankrupts, and bring actions against the others, provided that, on the whole, he do not receive more than twenty shillings on the pound upon the whole amount of the bill; but if any part of the bill has been received by the holder before he has actually proved it upon the estate of a party, he can prove only for the residue, and where a bill has been proved or claimed on another's estate, and a dividend reserved on such proof or claim, though not paid, it must be deducted": 1 Archbold on Bankruptcy (by Griffith and Holmes), p. 608, c. 10, sec. 4.

The dividends spoken of in the last part of the quotation are evidently dividends which have been declared and reserved on the other estate before the proofs are made by the holder against the other bankrupt estate. In such case, the dividend having been declared and reserved for the benefit of the holder, it is equivalent to a part payment of the original debt, and the owner of the debt cannot consistently or truthfully claim that his debt has not been reduced by the amount of such dividend. At the time the proof of claim is

made, if the whole debt be due and unpaid, it is the right of the party to present and prove his claim against both the estate of the maker and indorser for the whole debt, and he is entitled to claim that his debt shall share equally in the assets of each debtor in the proportion which his claim bears to all the other claims against the several estates; and a court of equity will not defeat the just claim of the holder of the note by the application of the dividends which may afterwards be awarded to him on the estate of the maker, so as to prevent him from obtaining his equal and just share of the estate of the indorser, unless the dividends awarded in both estates shall exceed the whole amount of his demand; and in that case, a court of equity would probably limit the right of the holder against the estate of the indorser to an amount which, added to the dividends against the estate of the maker, would pay the whole of his demands. Such a course would be equitable, and would work no injury to the holder of the note.

By the COURT. The orders appealed from are affirmed in each case, and the cases are remanded for further proceedings.

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**NEGOTIABLE INSTRUMENTS — BANKRUPTCY OF MAKER AND INDORSER — DIVIDENDS AGAINST ESTATES OF BOTH.** — A, the maker, and B, the indorser, of a promissory note made assignments for the benefit of their respective creditors. Each estate paid a dividend. It was held that the holder of the note was entitled to a dividend upon the whole amount of the note from each estate: *Miller's Estate*, 82 Pa. St. 113; 22 Am. Rep. 754. A creditor is entitled to a dividend on his whole claim against an insolvent, without first deducting the value of the collateral securities held by him: *Third Nat. Bank v. Haug*, 82 Mich. 607.

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## BOOTH v. WILKINSON.

[78 WISCONSIN, 652.]

**GUARDIAN DEPOSITING MONEY IN HIS OWN NAME AND TO HIS OWN CREDIT**, without any ear-marks or *indicia* to distinguish it as the money of his ward or as trust funds, must suffer any subsequent loss from the failure of the bank. The rule is the same when, in payment of a debt due his ward, a guardian received a certificate of deposit payable to his own order.

*E. M. Lowry, and Bushnell and Watkins*, for the appellants.

*W. E. Carter*, for the respondent.

ORTON, J. The appellants are the heirs at law of William Booth, deceased. Two of them are of age, and one still a minor, who appears by guardian *ad litem*. The respondent was their general guardian. Their mother, Mrs. Booth, had removed to Nebraska with her children, and had there been appointed guardian of the one infant heir, and the moneys belonging to the heirs had been sent to her there, by the respondent, when received by him. The respondent had sold a farm belonging to their estate, as guardian, to one Hilton, for about eleven thousand dollars, on notes secured by mortgage, all of which, and interest thereon, had been paid to the respondent, except the last two, amounting to two thousand dollars, and the money had been sent to Mrs. Booth, in Nebraska. The respondent had been notified by the county judge to make final settlement of his guardianship on the twelfth day of February, 1884, and he therefore called on Mr. Hilton to pay the last two notes, and Hilton looked around to borrow the money, and said that he could get it of one Mr. Harmes. Harmes called on the respondent on the 20th or 22d of January, to see in what shape he wanted the money. Harmes said it was in the Platteville Bank, and the respondent said: "If it is in the bank, it would be best to leave it there"; and that he would not want it until February 12th, the time of such settlement, and that he would then have to get a draft to send to Mrs. Booth, and it would be right there. Harmes then got a certificate of deposit, and turned it over to Hilton, and Hilton delivered it to the respondent on the twenty-eighth day of January, 1884. The following is a copy of the certificate: —

"PLATTEVILLE, WIS., January 24, 1884.

"John Harmes has deposited in this bank two thousand dollars, payable to the order of David Wilkinson, in current funds, on the return of this certificate properly indorsed.

[Signed]

"O. F. GRISWOLD, Cas."

The respondent held the certificate for the purpose of having it present on the twelfth or thirteenth day of February, the day of final settlement. On the eighth day of February the bank broke, and the money was lost. On said settlement the respondent was credited and allowed by the county court this two thousand dollars. On appeal to the circuit court, said judgment was approved by proper findings of fact and conclusions of law, and from that judgment this appeal is taken.

I have stated the facts about the delivery of the certificate



according to the testimony of the respondent. This statement of the facts relates only to this certificate of deposit, as this is the only subject of contention on this appeal. I have stripped the case of everything not material to the only question on this appeal. Nothing omitted would affect the question. It does not appear that the respondent directed how the certificate of deposit should be drawn, but he knew when he received it how it was drawn, and accepted it in its present form. He knew that the deposit stood on the books of the bank to his own personal credit. It could not be known by the books of the bank that this was trust money, and not his own. The rule may be technical and arbitrary to some extent, but it is based upon the soundest principles of business economy and integrity, and approved by the highest courts of this country and of England with such a unanimity of judgment as to make it an established principle of law, that if a guardian deposits the money in his hands belonging to the heirs in a bank in his own name and to his own credit, without any ear-marks or *indicia* to distinguish it as the money of the heirs or of the estate or trust funds, and the bank fails, it will be held to be his own personal loss, and not that of the heirs. No circumstances will justify it if such is the character of the deposit. It is not a question of good faith or of integrity—it is a question of naked fact—which determines its legal character.

The reason of the rule is obvious. The following extract, from the opinion of Judge Porter in *McAllister v. Commonwealth*, 30 Pa. St. 536, expresses, once for all, the rule, and some of the reasons of it: "If he [the trustee] undertakes to make a deposit in a banking institution, the entry must go down on the books of the institution, in such terms as not to be misunderstood, that they are the funds of the specific trust to which they belong. He cannot so enter them as to call them his own to-day if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another, or by the deposit secure the discount of his own note, and have the deposit snatched at by the bank if the note be not paid, or attached by a creditor as the depositor's individual property. . . . No matter what he intends to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to account, call it trust property." This was the exact condition of this fund, and all the reasons

of the rule are applicable to it as the personal and individual deposit of the respondent. The rule is inflexible, and there is not in this case a single circumstance which makes the rule inapplicable to it.

This is all that need be said in this case; for this court has sanctioned the rule in a recent case, where the depositor informed the teller of the bank, who gave the certificate of deposit, that they were trust funds, and did not belong to him. In *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, Mr. Justice Cassoday marshaled and passed in review the leading authorities of this country and of England, and sanctioned the rule in a case that rules this in all essential particulars. The loss in this case was that of the respondent, and not that of the heirs or their guardian in Nebraska, and therefore the respondent should be charged with this two thousand dollars in the settlement of his guardianship.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with direction for further proceedings in accordance with this opinion.

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**GUARDIAN AND WARD — RECOVERY OF MONEY TAKEN IN GUARDIAN'S NAME.** — Whenever a fiduciary relation exists, and money coming from the trust lies in the hands of a person standing in that relation, it can be followed and recovered from him: *First Nat. Bank v. Hummel*, 14 Col. 259; 20 Am. St. Rep. 257, and note.

Trust funds must be kept separate from the funds of a trustee, or he will be liable in case of loss. They must be deposited and loaned as trust funds: *Coffin v. Bramlitt*, 42 Miss. 194; 97 Am. Dec. 449, and note; *Line v. Lawder*, 122 Ind. 548. Where a guardian deposits money of a ward in a bank in his own name, and the bank fails, she must bear the loss occasioned thereby: *Jenkins v. Water*, 8 Gill & J. 218; 29 Am. Dec. 539, and note.

CASES  
IN THE  
SUPREME COURT  
OF  
CALIFORNIA.

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[IN BANK.]

KILBURN v. KILBURN.

[39 CALIFORNIA, 46.]

**MARRIAGE — MEANING OF "MARITAL RIGHTS, DUTIES, OR OBLIGATIONS."**

— The words "marital rights, duties, or obligations," mentioned in section 55, California Civil Code, providing that consent to marriage must be followed "by a mutual assumption of marital rights, duties, or obligations," mean such rights, duties, or obligations as arise from the contract of marriage and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform toward each other and to society.

**MARRIAGE — CONTRACT OF MARRIAGE.** — The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and such contract imposes upon the parties to it the obligation to live together in such relation.

**MARRIAGE, WHAT CONSTITUTES, UNDER CONTRACT.** — Where an agreement to marry is not followed by solemnization, there is no assumption of marital rights, duties, or obligations, within the meaning of section 55, California Civil Code, until the commencement of cohabitation by the parties to the agreement. And by cohabitation is meant, not simply the gratification of the sexual passion, but to live and dwell together, and to have the same habitation.

**MARRIAGE — WHAT DOES NOT CONSTITUTE.** — An agreement between parties to a marriage without solemnization, not followed by anything to indicate to the community that they have assumed the relation of husband and wife, is not an assumption of the marital rights, duties, or obligations contemplated by section 55, California Civil Code, and therefore does not constitute a marriage.

**MARRIAGE — DIVORCE — ADULTERY — EVIDENCE.** — In an action for divorce on the ground of adultery, where the marriage of the parties is not sought to be established by proof of their cohabitation, evidence of the alleged husband's subsequent marriage to the woman with whom he is alleged to have committed adultery is irrelevant and inadmissible.

*H. V. Morehouse*, for the appellant.

*William H. Webb*, for the respondent.

DE HAVEN, J. Action for divorce. The court below, approving and adopting the special verdict of the jury on this point, found that on May 23, 1886, the plaintiff and defendant entered into a contract of marriage, by which they agreed then and there to a present marriage, and that this contract was followed on their part by a mutual assumption of marital rights, duties, and obligations. The defendant, who is the appellant here, contends that the finding is not justified by the evidence.

It appears that the parties first met at a skating-rink in Salinas City, in August, 1885. At their second meeting, which was about a week afterwards, this acquaintance ripened into an act of illicit intercourse, followed by other similar acts at opportune times, and, as a fruit of this relation, the plaintiff gave birth to a child on May 16, 1886. One week thereafter, defendant went to see plaintiff at the residence of her sister, where she was stopping. Here the plaintiff met defendant in the parlor, alone, and at this meeting the plaintiff testifies that she and defendant agreed upon a present marriage, and that it was to be kept secret in Salinas City, but not elsewhere, and the baby was to be named after him. As stated, no witnesses were present; but plaintiff's mother and sister each testifies that she came into the parlor afterwards, and that defendant then repeated to her the said agreement made with plaintiff, in reference to a present marriage, and also said that he wanted plaintiff to go into a neighboring county and live for a while, the mother to go with her. The mother also testified that she was authorized by defendant to introduce plaintiff as his wife, and she did so; "only he wanted it kept quiet, so that it would not get back into the valley. He didn't care about it elsewhere." The plaintiff and her mother then went to the city of San José, and there remained until March following. During this period the defendant called to see her once, remaining from nine or ten o'clock in the morning until one o'clock in the afternoon. From the time of the alleged contract of marriage until the commencement of this action, the plaintiff and defendant never cohabited together,—that is, lived together in the same house,—although upon a few occasions they had sexual intercourse with each other; nor is there any evidence

that they were generally reputed to be husband and wife in the community where both lived, and defendant never contributed but seventy dollars to the support of plaintiff and her child. There is nothing to show that if such relation existed, it was known to any one except the parties, and the mother and sister of plaintiff. It is true, the mother testifies that she introduced plaintiff as the wife of defendant; but she does not name the person to whom such introduction was made, nor does such person or persons give evidence in the case. The defendant himself denies that he ever agreed to marry plaintiff, and there is other evidence which tends to corroborate him on this point; but as the finding of the court below was in favor of plaintiff, we have only thought it necessary to give the foregoing general outline of the case, as shown by the testimony offered by her, and upon which the court must necessarily have based its findings.

With this general statement of the nature of the evidence, we proceed to consider whether it is sufficient to show the existence of a marriage between the parties.

1. Section 55 of the Civil Code provides: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations."

As there is a substantial conflict in the evidence as to the contract or agreement for a present marriage between the plaintiff and defendant, we cannot, under the settled rule here, disturb the finding of the court below on this point. This consent being established, our next inquiry is, whether the evidence is sufficient to establish the fact that such consent was followed by a mutual assumption of marital rights, duties, or obligations; and in order to answer this it is necessary to first determine what is meant by the words "marital rights, duties, or obligations," as here used. We have no doubt that they refer to such rights, duties, or obligations as arise from the contract of marriage, and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform toward each other and to society.

"Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law by which a man and woman capable of entering into such a contract mutually engage with each

other to live their whole lives together in the state of union which ought to exist between a husband and his wife": *Shelford on Marriage and Divorce*, 1.

The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract therefore imposes upon the parties to it the obligation to do so: and where the agreement to marry is not followed by solemnization, there is no assumption of marital rights, duties, or obligations, within the meaning of section 55 of the Civil Code, until the commencement of cohabitation by the parties to the agreement. And by cohabitation is not meant simply the gratification of the sexual passion, but "to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also": *Yardley's Estate*, 75 Pa. St. 207. This was, in effect, so held in *Sharon v. Sharon*, 79 Cal. 670, the court there saying: "The commencement of true and open matrimonial cohabitation under such an agreement is a mutual assumption of marital rights, duties, and obligations, while mere copulation, without such cohabitation, is insufficient."

The evidence in this case falls far short of showing that after the alleged consent to marry these parties ever assumed the marital rights, duties, or obligations of the marriage relation as we have defined them. There was no cohabitation, such as almost universally accompanies marriage, and nothing to indicate to the community that they had assumed such relation.

2. The defendant offered to prove that he was on September 3, 1887, regularly united in marriage with Nellie Rowe, the woman with whom he is charged in the complaint to have committed adultery, and for this purpose offered to introduce a marriage license in due form authorizing such marriage, and the certificate of a clergyman showing its solemnization. These papers were excluded by the court. This ruling was correct. This kind of evidence has been considered sufficient to rebut the presumption of marriage, which otherwise would follow from proof of cohabitation and general reputation that such cohabitation was matrimonial in its nature: *Case v. Case*, 17 Cal. 598; *Jones v. Jones*, 48 Md. 391; 80 Am. Rep. 466. We are not called upon here to either affirm or dissent from the rule announced in these cases. It is sufficient to say that it does not apply to the facts of this case. There was no

proof of cohabitation in this case, and we do not see how the excluded evidence, in connection with the other evidence in the case, could have any legitimate or logical tendency to disprove the statements of witnesses who testified directly to the fact that more than a year previous thereto the defendant agreed to become the husband of the plaintiff.

This offered evidence, however, demonstrates the wisdom of the law in requiring an open matrimonial cohabitation of the parties thereto as evidence of marriage, where there is no solemnization, so that those contracting this relation may have some reasonable assurance that its validity, and the legitimacy of their children, will not be overthrown by proof of a prior secret marriage upon the part of either the husband or wife, and of which the other had no notice or suspicion.

Judgment and order reversed.

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**MARRIAGE, WHAT CONSTITUTES.** — Marriage is a civil contract. No ceremony is indispensably requisite to its creation. A contract of marriage between consenting parties of sufficient capacity made *per verba de presenti* is a valid marriage: *Voorhees v. Voorhees*, 46 N. J. Eq. 411; 19 Am. St. Rep. 474, and note. Compare *Grinn's Estate*, 131 Pa. St. 199; 17 Am. St. Rep. 796, and note; *Romel v. Romel*, 73 Mich. 133; 16 Am. St. Rep. 599, and note; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105, and note. A mutual agreement between a man and woman, having sufficient capacity to take each other for husband and wife, constitutes a valid marriage, though not made in the presence of witnesses: *Gall v. Gall*, 114 N. Y. 109.

**MARRIAGE — PRESUMPTION.** — No presumptions can arise as against a wife merely from the subsequent marriage of her husband to another woman; *Olman v. Sheets*, 78 Iowa, 499; *James v. Mickey*, 26 S. C. 370. Compare note to *Voorhees v. Voorhees*, 19 Am. St. Rep. 409; *Boulden v. McIntire*, 119 Ind. 574; 12 Am. St. Rep. 453, and note.

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## **MAYRHOFER v. BOARD OF EDUCATION OF SAN DIEGO.**

[89 CALIFORNIA, 110.]

**CONSTITUTIONAL LAW — CONSTRUCTION OF STATUTE.** — THE STATE IS NOT BOUND BY GENERAL WORDS in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.

**STATUTORY CONSTRUCTION — STATE PROPERTY EXEMPT FROM SEIZURE.** — A general law providing remedies for private individuals will not be construed as intended to enable a creditor of the state to seize its property for the satisfaction of his debt.

**MECHANICS' LIENS.** — PUBLIC PROPERTY AND PUBLIC BUILDINGS are not subject to mechanics' liens.

**MECHANIC'S LIEN — SCHOOL-HOUSE NOT SUBJECT TO.** — A school-house erected by a public school district is not subject to seizure under the

general mechanic's lien law, when the constitution prohibits every school district from incurring indebtedness exceeding the annual revenue provided for it, unless before the indebtedness is incurred provision shall be made for its payment by taxation.

*John M. Lucas*, for the appellant.

*Wellborn, Parker, and Stevens, J. P. Goodwin, and Watson and Hicks*, for the respondents.

**TEMPLE, C.** This action was brought to foreclose a lien for materials furnished to a subcontractor, for the building of a public school-house.

Final judgment was entered upon demurrer to the complaint, and plaintiff appeals from the judgment. Whether the laws of this state give to mechanics and material-men the right to have a lien upon such buildings is the only question necessary to consider upon this appeal.

Section 15, article 20, of the constitution provides: "Mechanics, material-men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

Section 1183 of the Code of Civil Procedure enacts that mechanics and material-men shall have a lien for labor or material used in the construction of any building or other structure.

The following sections prescribe the procedure and the effect of certain acts.

The claim is made that public buildings are included both in the word "property," used in the constitution, and in the phrase "any building," used in the code, and therefore it must necessarily follow that mechanics and material-men are, by these provisions, given a right to a lien upon such buildings.

But this ignores the rule of statutory construction, that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.

Says Mr. Justice Story, in *United States v. Hear*, 2 Mason, 314: "In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very



different, and often contrary, force to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

To the same effect are the following cases: *United States v. Swearingen*, 11 Gill & J. 373; *Commonwealth v. Baldwin*, 1 Watts, 54; 26 Am. Dec. 33; *Dollar Savings Bank v. United States*, 19 Wall. 239; *United States v. Davis*, 3 McLean, 484; *United States v. Williams*, 5 McLean, 133; *Commonwealth v. Johnson*, 6 Pa. St. 136; *Jesselyn v. Stone*, 28 Miss. 753; *People v. Herkimer*, 4 Cow. 345; 15 Am. Dec. 379; and a great many others.

It is misleading to say that this construction is adopted on the ground of public policy. The import of the language is not limited because it would be against public policy to give to the words their natural effect, but because, in view of familiar rules of construction, a different intent is manifested in the language used.

The government was created and shaped by the constitution. It is not an end in itself, but a mere instrumentality for public service. Its powers and functions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the service required of it. It is as much devoted to public use as are the streets and highways, though in a different way; and it is generally held by a different tenure.

Instead of being the natural and obvious conclusion, that a general law providing remedies for private individuals was intended to enable a creditor of the state to seize this property for the satisfaction of his debt, it would be a most unnatural inference.

The constitution has itself provided, as the only means which the state has for the payment of its debts, the exercise of the sovereign power of taxation. And for each political subdivision the rule is the same. These revenues are divided into specific funds, and one furnishing labor or materials to the state knows to what he must look for payment. He becomes a creditor of a specific fund, and has no rights except with reference to such fund.

The law conferring the right to a mechanic's lien implies a right of action to enforce it. One cannot sue the state, unless expressly authorized by statute, and this principle is embodied in our constitution. General statutes creating new remedies for individuals have never been held to authorize such suits.

The former constitution of the state provided: "All property in the state shall be taxed in proportion to its value." There was no express limitation upon the meaning of the words used, and unquestionably in their natural import they included public property. It was held that such construction would be inconsistent with the purposes of taxation: *People v. Doe*, 36 Cal. 220; and it is strange that such a case ever arose. The inconsistency there was perhaps a little more obvious than here; but the principle is the same, and the claim here is really as inconsistent as there, with the theory, plan, and policy of the government, with reference to its revenues and its tenure of the property it holds for public service.

The public policy appealed to is laid down in the constitution itself. It is a constitutional policy. The section under consideration, on its face, purports to be a code provision providing a remedy by individuals against individuals. The constitutional policy referred to but emphasizes the rule of construction, which would have been sufficient of itself. And the position is firmly fixed beyond cavil by section 18, article 11, which prohibits school districts from incurring indebtedness exceeding the annual revenue provided for it, unless before the indebtedness is incurred provision shall be made for the payment of the debt by taxation. Could there be a plainer declaration that all indebtedness shall be paid from the revenue provided by law?

Supposing, therefore, as we must, that the section in the constitution was framed in view of the well-known rule of construction, and in the same instrument in which are the other provisions alluded to, and that it omits to mention public buildings, it is manifest from the language itself that they are not included.

It would follow that the judgment should be affirmed.

FITZGERALD, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

**CONSTITUTIONAL LAW — INTERPRETATION OF STATUTES.** — Though a statute does not violate any special clause of the constitution, it may be in violation of its essential spirit, purpose, and intent: *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123. The constitution controls in preference to a statute: *County of Cook v. Industrial etc. School*, 125 Ill. 540; 8 Am. St. Rep. 386. No one can sue a state, except by its own consent: *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121. Rights which are part of state sovereignty conferred for public good cannot be lost by disseisin: *Treat v. Lord*, 42 Me. 552; 66 Am. Dec. 298.

**CONTRACTS OF A STATE — STATE PROPERTY EXEMPT FROM EXECUTION.** — A statute granting the right to maintain an action against a state does not give the right to execution upon state property upon a judgment obtained therein; if it did, it would be unconstitutional and void: *Carter v. State*, 42 La. Ann. 927; 21 Am. St. Rep. 404, and note. A public school-house is exempt from execution: *State v. Tiedemann*, 69 Mo. 306; 33 Am. Rep. 498. A statute exempting the property of counties from execution is a mere affirmation of the common law: *Gilman v. County of Contra Costa*, 8 Cal. 52; 68 Am. Dec. 290, and extensive note. Promises of a state to pay for services rendered have no legal obligation: *State v. Kinney*, 9 Mont. 389.

**PUBLIC PROPERTY NOT SUBJECT TO MECHANICS' LIENS.** — A mechanic's lien will not attach to a public school-house: *Charnock v. Township of Colfax*, 51 Iowa, 70; 33 Am. Rep. 116, and note.

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[IN BANK.]

## RICHARDS v. TRAVELERS INSURANCE COMPANY.

[80 CALIFORNIA, 170.]

**ACCIDENT INSURANCE — SUFFICIENCY OF COMPLAINT.** — A complaint on an accident insurance policy, averring that on a date named the deceased sustained bodily injuries through external, violent, and accidental means, and that such injuries alone caused the death of the assured, states a cause of action, and is good as against a general demurrer.

**ACCIDENT INSURANCE — SUFFICIENCY OF COMPLAINT.** — Where an accident insurance policy provides that the money shall be paid "within ninety days" after proof that the insured received injuries which alone "occasioned his death within ninety days from the happening thereof," a complaint alleging that "more than ninety days had elapsed prior to the commencement of this suit, after sufficient proof that the insured, at a time within the continuance of said policy, had sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries; and also containing an allegation that all the conditions of the policy had been complied with, — sufficiently avers notice and proofs of death, states a cause of action, and is good as against a general demurrer.

**ACCIDENT INSURANCE — DEATH BY ACCIDENTAL MEANS — BLOW STRUCK BY THIRD PERSON.** — Where the death of the insured is caused by a fall or by a blow struck by a third person, the death is caused by accidental means, within the terms of a policy insuring against injuries or death caused through "external, violent, and accidental means."

**ACCIDENT INSURANCE — CONSTRUCTION OF WORD "ACCIDENT."** — The word "accident," in accident insurance policies, must be given its popular meaning, and construed to include a casualty or something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured.

**ACCIDENT INSURANCE — CONDITION IN POLICY — CONSTRUCTION.** — A provision in an accident insurance policy that the insurance shall not extend to any cause of death unless the claimant shall establish by direct and positive proof that such death was caused by external violence and accidental means, and was not the result of design on the part of any person, merely states a condition that the death must not be caused by the act of one whose design was to cause death by the act, and does not include a case where a blow, not intended to kill, unfortunately and undesignedly produces death.

*T. M. Osment and Fred Searls, for the appellant.*

*C. W. Cross and P. F. Simonds, for the respondents.*

MCFARLAND, J. This is an action upon an accident insurance policy. By the terms of the policy, the insured — Philip Richards — was to have a sum of money paid him weekly in case of injury to him by accident, and his estate was to be paid five thousand dollars in case of his death from such injury. During the life of the policy said Richards was killed. The jury returned a verdict in favor of plaintiffs, executors of said Richards, deceased, for five thousand dollars, and defendant appeals from the judgment, and from an order denying a new trial.

1. We think that the complaint is sufficient. There was no formal demurrer, but defendant objected to a jury being impaneled, and to the introduction of any evidence, upon the ground that "the complaint does not state facts sufficient to constitute a cause of action." The first objection is, that the complaint does not state the particular circumstances under which the death of the insured occurred; that is, whether it was caused by lightning, drowning, railroad collision, etc. But the complaint avers that at a named date the deceased "sustained bodily injuries effected through external, violent, and accidental means, and that on, to wit, the twenty-seventh day of May, 1887, the said Philip Richards died at Nevada City, Nevada County, California, and that the said death was occasioned by said injuries alone." This language, which avers a state of facts expressly provided against by the covenants of the policy, is sufficient as against an attack which is no more specific than a general demurrer.

The other objection to the complaint is, that it does not aver

notice and proofs of death as required by the policy. But it is averred that "said Philip Richards and said plaintiffs have duly complied with all the terms and conditions of said policy and renewal by them, or either of them, to be kept or performed"; and this was generally a sufficient pleading of conditions precedent: Code Civ. Proc., sec. 457; *Blasingame v. Home Ins. Co.*, 75 Cal. 638. It has been held in some cases that where money covered by an insurance policy is not to be paid until a certain time after the loss, or after notice and proofs of the same, there should be a special averment that such time had elapsed. In the case at bar there was a provision in the policy that the money should be paid "within ninety days" after proof that the insured received injuries which alone "occasioned his death within ninety days from the happening thereof," and with respect to this matter, it is alleged in the complaint that "more than ninety days had elapsed prior to the commencement of this suit, after sufficient proof that the insured, at a time within the continuance of the said policy, had sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of said policy; that such injuries alone had occasioned death within ninety days from the happening of such injuries." This averment, together with the general averment above noticed, makes the complaint entirely sufficient as against a general demurrer.

2. Upon the merits, appellant contends that the verdict was not justified by the evidence, and that the court erred in its instructions to the jury.

The deceased lived at Nevada City, and was brought by one H. J. Dassonville to the drug-store and office of a physician in that city about nine o'clock on the evening of April 22, 1887. He was suffering from a severe wound on the head and over the left eye, from the effect of which he died on the 27th of the next month, May, 1887. There was evidence tending to show that the wound was caused by a fall from an elevated sidewalk down onto Spring Street, in which there were rocks and piles of old iron; but appellant contends that the evidence shows the wound to have been inflicted by said Dassonville, who, after a failure to blackmail the deceased, suddenly struck him a blow with some instrument or thing capable of producing the wound.

The general terms of the policy provide against injuries or death caused through "external, violent, and accidental

means." The means by which the death of the deceased was caused were certainly "external and violent"; and while there was not much evidence to show that it was caused by a blow from Dassonville, still, in that case, the jury had the right, under the evidence, to find it "accidental," within the general covenants of the policy. It is impossible to give a precise definition to the word "accidental." As every effect has a cause, there is one sense in which nothing is accidental.

Accident policies are of recent origin, and there have been only a few judicial decisions with respect to them. But the authorities to be found on the subject seem to be to the point that "accident" must be given its popular meaning; that is, a casualty, — something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan, in the case of *Ripley v. Railway Co.*, 2 Bigelow's Life & Acc. Ins. Cas. 738. In that case the insured had been attacked by highwaymen and killed, and it was contended that as the highwaymen intended violence, there was no accident. The learned judge (Withey, J.), in delivering the opinion of the court, says: "Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptance, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event. . . . I think, in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract, and are to be held, in the absence of plain, unequivocal exceptions and provisions, to intend what, in popular acceptance, the insured party is likely to understand by its

terms." In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of "accident" was not discussed: *Ripley v. Insurance Co.*, 16 Wall. 336; but the language of Judge Withey seems to us to express correct views of the question. It is quoted approvingly in other authorities: *Bliss on Life Insurance*, sec. 438; 7 Am. Law Rev. 587; 1 Am. & Eng. Ency. of Law, p. 87, sec. 3, and notes; *Providence Ins. etc. Co. v. Martin*, 32 Md. 315. We are of opinion, therefore, that if it could be considered that, in the case at bar, the death of the deceased was caused by a blow from Dassonville, still it was caused by "accidental means," within the general terms of the policy.

The policy, however, contains a special condition, as follows: "This insurance shall not be held to extend to disappearances, or to any cause of death or personal injury, unless the claimant under the policy shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the insured or of any other person." Respondent contends that this clause is a mere attempt to change the rules of evidence, and therefore entirely void; that it is not a provision about anything except evidence. We do not think it necessary to examine this contention. Taking the provision as valid, it merely states as a condition, so far as it applies to the circumstances of this case, that the death shall not be the result of the design of any person; that is, that it must not be caused by the act of one whose design was to cause death by the act. The point was presented by the fifth instruction given by the court, as follows: "If the death of Philip Richards was caused by a blow dealt him by H. J. Dassonville, or some other person, that would not prevent plaintiffs from recovering in this action, if you believe from the evidence that when Dassonville or such other person inflicted such blow, he did not mean to kill said Philip Richards." We are of opinion that this instruction is not erroneous.

There were circumstances in evidence tending to show that if Dassonville did give the blow which resulted afterwards in the death of deceased, he did not intend such result. And it would not be a correct construction of the clause of the policy under review to say that it includes every case where a blow, not intended to kill, unfortunately and undesignedly produces

death, and particularly when we consider the rules of construction which apply to the makers of instruments.

The other instructions of the court seem to be unobjectionable, and to present the law of the case very fully. Those given at the request of the defendant presented that side of the case very favorably. Instructions No. 1 and No. 5, asked by defendant, were properly refused; whatever was correct in them was given elsewhere.

The judgment and order appealed from are affirmed.

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**ACCIDENT INSURANCE — "ACCIDENT," DEFINITION OF.** — As to what is included in the meaning of the word "accident," as used in policies of accident insurance, see *Hutchcraft v. Travelers Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484, and note; *Paul v. Travelers Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 758, and particularly note 763-766; *Hull v. Equitable Accident Ass'n*, 41 Minn. 231. Suicide by an assured who is *non compos* is not within the forfeiture clause of an accident insurance policy which stipulates that no claim shall be made thereunder in case of death by suicide; *Blackstone v. Standard etc. Accident Ins. Co.*, 74 Mich. 592.

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[IN BANK.]

## RANKIN v. AMAZON INSURANCE COMPANY.

[89 CALIFORNIA, 208.]

### INSURANCE — SURVEY AND DIAGRAM AS EVIDENCE OF REPRESENTATIONS. —

Where a policy of fire insurance provides that for further particulars reference is hereby made to an application, survey, and diagram, made a part of the policy, and declared to be a warranty on the part of the insured, the fact that such survey and diagram were not furnished until after the policy was delivered, while it may have deprived them of any force as a warranty, does not destroy their effect as evidence of a representation of facts made as an inducement for the issuance of the policy, and as such evidence they are admissible on the issue as to a rescission of the policy.

### INSURANCE — SURVEY AND DIAGRAM AS EVIDENCE OF REPRESENTATIONS. —

In an action on a policy of fire insurance made payable to the creditors of the insured, and containing a provision that a survey and diagram referred to therein are made a part thereof, such creditors, after furnishing the survey and diagram, cannot object to their introduction in evidence as representations inducing the issuance of the policy, on the ground that they were signed by a person not authorized to act for the owner of the insured property.

### INSURANCE — FALSE REPRESENTATIONS — RESCISSION. —

Where any of the material representations in a fire insurance policy are false, the insurer's tender of the premium and notice that the policy is canceled, before the commencement of suit thereon, operate to rescind the contract of insurance.

### INSURANCE — CONSTRUCTION OF POLICY. —

Where the language of an insurance policy may be understood in more senses than one, it is to be con-



strued most strongly against the insurer. If there is no imperfection or ambiguity in the language, it must be construed, like any other contract, according to the intention of the parties.

**INSURANCE — WATCHMAN — NON-COMPLIANCE WITH CONDITION.** — A man employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night, within the meaning of a fire insurance policy providing that a "watchman shall be employed by the insured, to be in and about the premises day and night."

**INSURANCE — WATCHMAN — NEGLIGENCE — COMPLIANCE WITH CONDITION.** — Where loss is caused under a fire insurance policy by the mere fault or negligence of a watchman employed by the assured, and without fraud or design on the part of the latter, it is within the protection of the policy; but, to entitle the assured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the policy.

**INSURANCE — BURDEN OF PROOF.** — In an action on a fire insurance policy, proof on the part of the insurer of the existence of a condition of things imposing a certain duty on the assured casts upon the latter the burden of proving a compliance with such duty.

*Haggin, Van Ness, and Dibble, for the appellant.*

*Doyle, Galpin, and Zeigler, and Philip G. Galpin, for the respondents.*

**PATERSON, J.** This is an action on a fire insurance policy to recover the sum of \$548.24.

The policy contained the following clause: "Reference is hereby made to a survey and diagram on file in the office of J. C. Mitchell and Son, which is made a part of this policy, and a warranty on the part of the assured." The application for the policy was made on November 21st, but was not countersigned or delivered until November 24, 1884. Mitchell and Son, who were insurance brokers, acted on behalf of plaintiffs in procuring the policy, and they promised at the time the application was made to furnish the survey and diagram. The company refused to take the risk unless the brokers would agree to furnish such a survey. A survey and diagram was made by the owners of the property, and a copy thereof, dated December 4, 1884, was presented to the agents of the defendant, but at what precise time it was presented does not appear. On December 3, 1884, the policy was taken to the office of the defendant and the written portion thereof was changed, increasing the amount of the insurance, and another rider, which was duly authenticated and attached, was substituted, which contained the same reference, quoted above. The survey and diagram consisted of many questions and answers. It was written on the blank form of another

insurance company, and was signed "Owens River M. G. & S. Co., by Hoyt and Son, applicants." The policy ran to the Owens River Iron and Smelting Company (owners), "loss, if any, payable to Rankin, Brayton, & Co." When this document was offered in evidence, plaintiffs objected to it on the grounds that the insurance had been effected prior to the time the survey was presented to the company, and that Hoyt and Son had no authority to act on behalf of the mining and smelting company. The objection was sustained; the defendant excepted.

The ruling was erroneous. The loss was not payable to the owners of the mine, but to their creditors, Rankin, Brayton, & Co., and the question as to the authority of Hoyt and Son is immaterial. Plaintiffs promised to furnish the survey, and it was furnished in accordance with their agreement, and became a part of the contract. The admissibility of the evidence does not depend solely upon the reference contained in the rider. The policy itself provides: "For further particulars reference is hereby made to an application and survey, No. —, furnished by and a warranty on the part of the assured, which is hereby made a part of this policy." The delay of the plaintiffs in furnishing the survey should not be held to entirely destroy its efficacy as a part of the contract. The fact that the survey was not furnished until after the policy was delivered may have deprived it of any force or effect as a warranty, under section 2605 of the Civil Code; but conceding this to be true, it does not destroy its effect as a representation of facts made as an inducement for the issuance of the policy; and as such it is evidence which the jury should consider on the issue as to rescission. If any of the material representations were false, the defendant's tender of the premium and notice that the policy was canceled, before the commencement of the suit, operated to rescind the contract: Civ. Code, secs. 2580, 2583.

The policy as first printed and written contained this clause: "It is understood and agreed that during such time as the above mill is idle a watchman shall be employed by the insured, to be in and upon the premises day and night." At the request of the plaintiff this provision was changed by inserting the word "about" in lieu of the word "upon." The object of the change doubtless was to avoid any controversy, in case of loss, as to whether it was necessary that the watchman should be actually upon the premises on which the

insured buildings stood. The change, however, did not accomplish the full purpose intended; for the watchman slept a distance of three hundred or four hundred feet from the mill; and the word "about," as used, is so uncertain in signification that it cannot be determined therefrom exactly what territory was intended to be covered by it. But however uncertain the promissory warranty may be as to the premises upon which the watchman was required to be, there is no ambiguity in the language with respect to the time he was required to watch the premises. Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it, and is supposed to make it as potent as possible in his own favor; but where there is no imperfection or ambiguity in the language, it must be construed, like any other contract, according to the intention of the parties.

The court instructed the jury that "if the assured employed a watchman to be in and about the premises day and night while the mill was idle, then the plaintiff is entitled to recover," and submitted to them for determination the question whether plaintiffs had performed the conditions of the contract. Cases are cited by respondent in support of the action of the court which hold that under certain watchman clauses it is proper to receive evidence of usage, and to submit to the jury the question whether the insured employed a watchman to look after the property in the manner in which men of ordinary care in similar departments of business manage their own affairs of like kind. But they all go off upon the proposition that the terms of the warranty are not explicit as to the time and manner of keeping a watch. Thus in the *Massachusetts* case, the language of the clause was, "a watchman kept on the premises"; and in the *Illinois* case, "a watchman to be on the premises constantly during the time until September 1, 1872." In the latter case plaintiff had employed a day-watchman and a night-watchman, and the only question considered was, whether it was necessary for the watchman to be actually on the premises on which the insured buildings were situated.

In the case before us the terms of the warranty are explicit as to the time of keeping a watch, and on the undisputed evidence we think the court ought to have held that the plaintiffs had not complied therewith.

The mill was idle for two months prior to the destruction

thereof by fire, and the evidence shows that plaintiffs did not employ a watchman "to be in and about the premises day and night." A watchman was employed, but he was not instructed to watch the premises at night, and as a matter of fact, slept every night in a building distant three hundred or four hundred feet from the mill. Mr. Minear, the superintendent, testified that McMurray, the watchman, was not instructed to watch the premises during the night; that his instructions were not special, "either at day or night." In the nature of things, it could not be expected that one man could watch the buildings day and night (only one watchman was employed); but if it be assumed that he could, no one was employed to do so. There is no ambiguity in the phrase "day and night." "We do not need a dictionary, nor a law book, nor the testimony of an expert, to tell us that a man who is employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night": *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349; *Glendale M. Co. v. Protection Ins. Co.*, 21 Conn. 39; 54 Am. Dec. 309. It is not a case of mere negligence. If a loss is occasioned by the mere fault or negligence of the watchman, unaffected by fraud or design on the part of the insured, it is within the protection of the policy; but to entitle the insured to recover, it must appear that he has in good faith employed a watchman to perform the duties required by the terms of the warranty: *Trojan Mining Co. v. Fireman's Ins. Co.*, 67 Cal. 27; *Wenzel v. Commercial Ins. Co.*, 67 Cal. 438; *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181; *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 219.

It does not appear whether the watchman was actually on duty at the time the fire occurred. If the fact be considered as material, it is sufficient to say that defendant having shown the mill was idle, the burden of proving a compliance with the warranty rested upon the plaintiffs: *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181; *Wood on Fire Insurance*, 2d ed., 1136.

The judgment and order are reversed, and the cause is remanded for a new trial.

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**FIRE INSURANCE — WHAT MAY BE INCLUDED IN THE CONTRACT.** — A writing intended to be a part of a contract of insurance may be incorporated therein by reference, as well as by an extended recital: *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 236; 58 A. L. Dec. 420, and note. Compare *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; 22 Am. Dec. 587; *Vilas v. New York O. Ins. Co.*, 72 N. Y. 590; 23 Am. Rep. 186; *Farmers' Ins. etc. Co. v. Snyder*, 16 Wend. 481; 30 Am. Dec. 118, and note.

**FIRE INSURANCE — POLICY, CONSTRUCTION OF.** — Contracts of insurance must be interpreted according to the same rules which govern in construing other written contracts. All ambiguities are resolved against the insurer and in favor of the assured: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 808, and note 825, 826; *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77; *Mutual Assur. Soc. v. Scottish Union etc. Co.*, 84 Va. 116; 10 Am. St. Rep. 819, and note; *De Graff v. Queen Ins. Co.*, 38 Minn. 591; 8 Am. St. Rep. 685, and note.

**FIRE INSURANCE — ACTION ON POLICY — BURDEN OF PROOF.** — The burden of proof is upon the plaintiff to show that he has complied with the conditions which entitle him to a recovery upon his policy: *Phenix Ins. Co. v. Pickett*, 119 Ind. 155; 12 Am. St. Rep. 393; *McLeon v. Commercial Ins. Co.*, 100 Mass. 472; 97 Am. Dec. 116; 1 Am. Rep. 129; *Pelican Ins. Co. v. Troy etc. Ass'n*, 77 Tex. 225. The burden is upon the defendant to show what statements the plaintiff made in his application and their falsity: *Reach v. Kentucky etc. Co.*, 28 S. O. 431. Plaintiff's complaint in an action upon a policy of fire insurance must allege performance of all conditions precedent to recovery: *Baker v. German F. Ins. Co.*, 124 Ind. 490; and that the loss occurred by reason of some peril insured against; but it need not allege performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from excepted risks: *Blasingame v. Home Ins. Co.*, 75 Cal. 633.

## HAIGHT v. VALLET.

(29 CALIFORNIA, 245.)

**FORGED DEED — REFUT OF RECORD.** — A forged deed is void, and conveys no right, title, or interest, nor does the recording of such instrument affect the legal rights of the parties.

**FORGED DEED — CONFLICTING INSTRUCTIONS GROUND FOR REVERSAL.** — Where defendant in ejectment claims under a deed alleged to be forged, and pleads the statute of limitations, conflicting instructions as to the time when the statute began to run are grounds for reversal.

**FORGED DEED — EJECTMENT — EVIDENCE.** — In ejectment to recover land alleged to be held under a forged deed, the jury have the right, in determining the question as to whether the grantor therein executed and acknowledged such deed, to take into consideration the subsequent conduct of such grantor, and whether he ever, after the date of the deed, set up any claim to the property or made any claim of possession upon the parties in possession, paid the taxes or street assessments on the land, or did any act asserting ownership during his lifetime, and subsequent to the date of such deed.

**EXPERT EVIDENCE SHOULD BE RECEIVED WITH GREAT CAUTION,** and rejected by the jurors, the same as the testimony of any other witness, if after due consideration they deem it not well founded in fact. They may use their own knowledge and judgment in matters of handwriting, and are not legally compelled to follow the opinion of experts.

**EJECTMENT.** The following instruction is referred to in the opinion: "In regard to the weight to be given by you to the

testimony of Messrs. Hyde and Hickox, who were called by the defendants to testify in regard to a signature of Joseph M. Brown, I instruct you as follows: The law permits, in certain cases, a skilled person to give his opinion in testimony in regard to matters in which he is specially skilled; but such testimony should be received by you with great caution, and you are at liberty to reject it, the same as the testimony of any other witness, if after due consideration you deem it not well founded in fact. And in regard to said signature, you are at liberty to use your own judgment and knowledge in matters of handwriting, and are not legally compelled to follow the opinion of either of said witnesses. In other words, you should consider their testimony precisely the same as you do any other witness. You are not legally bound to adopt their theory, unless you are satisfied that it is correct. If you are satisfied their theory is correct, then it should be adopted, and you should act upon it accordingly."

*Edward R. Taylor, and Taylor and Haight, for the appellants.*

*Wilson and Wilson, and Cope, Boyd, and Fifield, for the respondents.*

SHARPSTEIN, J. This is an action of ejectment, and one of the defenses to the action is, that the plaintiffs' ancestor conveyed the demanded premises to the grantor of the defendants. Another defense is, that the action is barred by the statute of limitations. The verdict and judgment were in favor of the defendants, and the plaintiffs appeal from the judgment and order denying their motion for a new trial.

The exceptions relied on here are to certain instructions given, and the refusal to give certain other instructions requested by defendants to be given.

Plaintiff requested the court to instruct the jury that "a forged deed conveys no right, title, or interest; it is absolutely void, and as though never made." The court refused to give it as requested, but in lieu thereof gave the following: "A forged deed conveys no title, right, or interest; it is absolutely void, and as though never made; except if duly recorded it is constructive notice of that fact."

The latter clause of this instruction is clearly erroneous, and is inconsistent with another part of the charge, in which the jury were instructed that "no legal effect can be produced upon the rights of the parties by recording a forged instrument."

Another instruction excepted to by plaintiffs reads as follows: "If you find from the evidence that the said Joseph M. Brown, the ancestor of plaintiffs, was not in possession of the property in question, or any part thereof, from and after the eighteenth day of December, 1860, or from any other period prior to the fourth day of March, 1861, to the time of his death, November 2, 1864, and that during that time the defendants or their grantors, or those under whom they claimed, were in the open, notorious, continuous, and exclusive possession of said property, and that defendants and those under whom they claim continued such possession for the period of five years, and during all of said time were claiming to own the same adversely to all other persons, and exclusive of any other right, then your verdict should be for the defendants, notwithstanding that the children of said Brown were minors at the time of his death."

Another instruction which appellants claim to be in conflict with the one last above quoted reads as follows: "The ancestor of the plaintiffs—that is, Joseph M. Brown—had died on the second day of November, 1864, nearly two years prior to the 20th of August, 1866, so that I instruct you that the statute of limitations, with reference to the land in controversy, did not commence to run against him during his lifetime. And inasmuch as the statute of limitations did not commence to run in his lifetime, and did not commence to run against his children until the twentieth day of August, 1866, and inasmuch as neither of the children had reached the age of majority five years prior to the commencement of this action, I instruct you, as a matter of law, that the defense of the defendants, as against either of the children, and that whatever testimony has been given before you respecting the occupancy or possession of the land in controversy for the purpose of establishing an adverse possession, must be disregarded in your determination of the rights of the plaintiffs, other than the representative of Josephine D. Brown, the widow of Joseph M. Brown."

There is another instruction which is clearly inconsistent with the one first above quoted. It is as follows: "As I have before stated to you, the statute of limitations could not in any event have run with respect to the land in controversy until the first day of July, 1864."

Thus the jury were instructed that the statute of limitations might have commenced running in 1860, if the plain-

tiffs' ancestor was not then in possession of the land; and that the statute of limitations could not have run with respect to the land in controversy until the first day of July, 1864; and that it did not commence to run against the children of Brown until the twentieth day of April, 1868.

That two of these instructions contradict a third is apparent; that, taken together, they are confusing is also apparent.

In *Brown v. McAllister*, 39 Cal. 573, the court said: "Where the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail, and it is equally impossible, after the verdict, to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be, where the two are repugnant."

That it is a sufficient ground for reversing a judgment has frequently been held: *People v. Valencia*, 43 Cal. 552; *McCreery v. Everding*, 44 Cal. 246; *Chidester v. Consolidated P. Ditch Co.*, 53 Cal. 57; *Bank of Stockton v. Bliven*, 53 Cal. 708; *People v. Wong*, 54 Cal. 154; *Aguirre v. Alexander*, 58 Cal. 26.

Another instruction excepted to was, that "in determining the question as to whether Joseph M. Brown, the ancestor of plaintiffs, executed and acknowledged the deed which purported to have been executed to said Henry P. Hulbert," the jury had a right "to take into consideration the subsequent conduct of said Joseph M. Brown during his lifetime, and whether he ever, after the date of said deed, set up any claim to the property or made any claim upon the parties in possession of the same for the delivery of possession to him, or paid the taxes or street assessments on the same, or did any other act asserting ownership over the property, during his lifetime, after the date of said deed."

We think this instruction correct. The evidence upon which it was based is not set out in the transcript, but the statement in it is, that defendants introduced evidence which tended to prove "that said deed purporting to have been executed by said Joseph M. Brown to said Hulbert was the genuine deed of said Brown."

We think testimony of such conduct on the part of Brown as the court in the instruction specifies would have a tendency to prove the genuineness of the deed which purported to be executed by him, and therefore we cannot presume that such evidence had not been introduced. We cannot presume



error, and in this instance none is shown. The exception to this instruction is overruled. The instruction given in regard to expert testimony is not, in our opinion, erroneous. The exception to that instruction is overruled. But for errors before pointed out, the judgment and order denying the motion for a new trial must be reversed.

Judgment and order reversed.

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**FORGED DEED — EFFECT OF REGISTRATION.** — In an action to recover possession of land in the hands of an innocent purchaser, who claims title through a forged deed, which has been of record for five years with knowledge of the plaintiff, such delay does not estop the plaintiff to say that the alleged deed is not his deed: *Meley v. Collins*, 41 Cal. 663; 10 Am. Rep. 279. The registry of a deed does not give notice of fraud in its execution: *Godbold v. Lambert*, 8 Rich. Eq. 155; 70 Am. Dec. 192. Where a deed is in law a forgery, the question of good faith is not involved: *McGinn v. Tobey*, 62 Mich. 252. A person holding a forged deed can recover thereon for purposes of title only where it is accompanied with actual adverse possession, commenced without notice, and in good faith: *Parker v. Waycross etc. R. R. Co.*, 81 Ga. 387.

**WITNESSES — EXPERT EVIDENCE.** — In an ordinary case it is error to instruct the jury that expert medical testimony should be received and weighed with caution, but the weight and value of such testimony are questions for the jury: *Atchison etc. R. R. Co. v. Thul*, 33 Kan. 255; 49 Am. Rep. 484. Under an instruction that while the jury should consider the opinions of experts, in connection with all the other evidence, they are not bound to act thereon to the exclusion of other evidence, but should determine the question from all the evidence: *Guetig v. State*, 66 Ind. 94; 32 Am. Rep. 99, and note; *Travis v. Brown*, 43 Pa. St. 9; 82 Am. Dec. 540, and note.

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## HARRISON v. McCORMICK.

[80 CALIFORNIA, 527.]

**SALE BY SAMPLE — PAROL EVIDENCE.** — When a contract is in writing, and nothing therein indicates that a sample was used or referred to, parol evidence is not admissible to show a sale by sample.

**CONTRACT, CONSTRUCTION OF, WHEN A QUESTION OF LAW.** — Whether or not a writing, upon its face, is a complete expression of the agreement of the parties is one of law.

**CONTRACT — PAROL EVIDENCE, WHEN INADMISSIBLE TO VARY.** — Where a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed.

**CONTRACT — WHEN "ETC." IS SURPLUSAGE.** — If the abbreviation "etc.," used in a contract, is meaningless, and does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was

not intended by the parties as a memorial of all the terms of their contract, nor in any manner affect the legal construction of the contract, it will be disregarded as surplusage.

**SALE BY SAMPLE — PAROL EVIDENCE — PLEADING.** — Where a contract sued on appears to be complete in itself, but its execution is denied, and it is alleged that the contract of sale was by sample, parol evidence to show that the goods delivered were not of the kind or quality named in the contract is inadmissible, in the absence of allegations that defendant was induced to enter into the contract alleged by fraudulent representations, or of mistake in reducing the contract to writing.

**SALE UNDER CONTRACT — ADMISSION OF EVIDENCE OF SALE BY SAMPLE PREJUDICIAL ERROR.** — Where, in a suit on a contract of sale which appears complete in itself, and contains nothing to indicate that a sample was used or referred to in making it, the court finds that the goods delivered were of the kind and class named therein, but fails to find that they were not merchantable, nor equal in quality to those called for in the contract, the admission of parol evidence to show a sale by sample, and that the goods delivered did not correspond therewith, and judgment was for defendant, is reversible error.

*Craig and Meredith*, for the appellant.

*H. C. Firebaugh*, for the respondents.

DE HAVEN, J. The defendants had judgment in the court below, and from such judgment, and an order denying him a new trial, the plaintiff appeals.

The action is for a balance alleged to be due plaintiff on account of the sale of fifty tons of coal, sold under the name of Montana Lump Lehigh Hand-picked Coal.

The answer sets up, among other defenses, that the coal was sold by sample, and not by name, and that the coal delivered did not correspond with the sample.

The plaintiff proved that an agreement for the sale of the coal was reduced to writing, and executed in duplicate, and that the one retained by him was lost. He then proved the contents of this written agreement by a witness, who refreshed his memory from a letter-press copy of the written portion of said agreement, and a blank memorandum of contract similar to that upon which the agreement was written.

The contract as thus proven is as follows:—

“SAN FRANCISCO, January 12, 1882.

“Messrs. McCormick and Lewis. Ordered from J. W. Harrison fifty tons Montana Lode Lump Hand-picked Coal, early lading in New York. Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc., and the freight to be paid on receipt of coal here, at \$13.50 per ton per 2,240

pounds, gold coin, payable as above, delivered from ship's side when landed. Any shortage in excess of two per cent to be paid by the seller."

The record does not disclose any conflict in the evidence as to the fact that there was a written agreement or that its written terms were as above set forth. The defendants, however, were permitted to show by parol evidence that the contract was for coal of the same kind and quality as the defendants had previously bought from plaintiff, and which they were then using in their foundry, and that the coal delivered was not of the kind or quality thus referred to as a sample; and the question presented by this appeal is, whether this parol evidence was properly admitted.

1. We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample: Tiedeman on Sales, sec. 188; *Wiener v. Whipple*, 53 Wis. 298; 40 Am. Rep. 775; *Thompson v. Libby*, 34 Minn. 374.

In *Wiener v. Whipple*, 53 Wis. 298, 40 Am. Rep. 775, the written contract was as follows: "Bought of Cass Whipple, about three hundred bushels of barley, at sixty-five cents per fifty pounds, to be delivered by the 15th of September next. Paid on the same, twenty-five dollars." And it was held not competent to add to the terms of this agreement by parol evidence that the sale was made by sample.

In *Thompson v. Libby*, 34 Minn. 374, it is distinctly held that in a sale of personal property a warranty of its quality, if made at all, forms a part of the contract of sale, and is not a collateral contract, and therefore proof of such warranty cannot be added to the written agreement by parol evidence.

It is claimed that the agreement proven by plaintiff was a mere informal memorandum, incomplete upon its face, and not intended to contain all the terms of the contract, and that for this reason the oral evidence was proper. We do not so regard the writing under consideration. It contains within itself all that is necessary to constitute a contract, and this being so, in the absence of any averment in the answer of defendants that there was an omission or mistake made in reducing it to writing, it is not competent to show by oral

evidence that it does not state all of the terms of the agreement.

The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed": *Thompson v. Libby*, 34 Minn. 377. See also *Naumberg v. Young*, 44 N. J. L. 339; 43 Am. Rep. 380.

In Greenleaf on Evidence, section 275, it is said: "When parties have deliberately put their engagement in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing."

Tested by this consideration, it is clear that the agreement here is to be deemed complete, as it imports a clear legal obligation, and without any uncertainty as to what the parties thereto undertook to perform. It states an agreement for the sale and delivery of fifty tons of coal of a particular name, and it contains either expressly or by implication everything necessary to make the mutual obligations of the parties, arising out of a contract of sale, complete. This is therefore to be deemed a written contract, and other terms and conditions which might have been introduced into it by the parties, but were not, cannot be added by parol.

The abbreviation "etc.," found in the sentences, "Ship to be named, original cost, etc.," "To be paid on receipt of bills of lading, etc.," does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was not intended by the parties as a memorial of all the terms of their contract. In the connection used, the abbreviation used is meaningless, and in no manner affects the legal construction of the agreement, and is therefore to be disregarded as surplusage.

2. The respondents further insist that this evidence was

proper, because it tended to show that a fraud was practiced upon them in the making of the contract. This would be so, if such a defense had been made in the answer. The answer denied the execution of the contract alleged in the complaint, and avers that the contract of sale was by sample, but it contains no averment that defendants were induced to enter into the contract alleged in the complaint by any fraudulent representation, as that the coal described in such contract by name was the same kind and quality of coal previously bought by defendants from plaintiff, and without such averments, or an allegation of mistake in reducing the contract to writing, this evidence was irrelevant and immaterial.

3. The court does not find as a fact that the coal delivered to respondents was not merchantable. It is true, one part of the finding is to the effect that it "was filled with slate and dirt and foreign matter," but this is said in connection with the statement that it was not as good as the sample by which the court finds it was sold. In another portion of its findings the court declares that it was not as good as the sample referred to, "but it was of the kind, variety, and class known as Montana Lump Lehigh Hand-picked Coal." If it was, then the respondents got what was called for by the written contract, unless it was not equal in quality to coal of that brand. There is no finding that it was not.

In this state of the findings we cannot hold that the admission of the oral evidence, as to the sale by sample, was immaterial, as it would have been if the court had found that the coal delivered was not merchantable, nor equal in quality to that called for by the contract alleged in the complaint, and that plaintiff had been paid its full value.

Judgment and order reversed.

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CONTRACT IN WRITING. — PAROL EVIDENCE: See *Stanton v. New York & N.Y. Co.*, 59 Conn. 272; 21 Am. St. Rep. 110, and note; *Gilbert v. Stockman*, 75 Wis. 62; 20 Am. St. Rep. 23, and note. When parties reduce their agreement to writing, the written contract is presumed to contain the whole contract as agreed upon between the parties: *State v. Hoshaw*, 98 Mo. 358; and in the absence of fraud, mistake, or accident, parol evidence will not be admitted to vary or contradict the writing: *Hills v. Riz*, 43 Minn. 543; *Borch v. Augusta etc. R. Co.*, 80 Ga. 297. This rule has been applied to the following instruments in writing: An assignment for the benefit of creditors: *Martin v. Taylor*, 52 Ark. 389; an attorney's due-bill: *Bomar v. Railroad Co.*, 30 B. C. 451; a certificate issued by a bank: *Baer's Appeal*, 127 Pa. St. 360; an architect's contract: *Marquis v. Laureston*, 76 Iowa, 22; a contract for the exchange of lands: *Stanhope v. Swafford*, 80 Iowa, 45; contracts for the sale of realty: *Bowen v. Dotterer*, 80 Ga. 51; *Johnson v. Flanner*, 49

LA. ANN. 522; contracts for the sale of chattels: *McQuaid v. Ross*, 77 Wis. 470; a covenant: *Adams v. Ft. Gaines*, 80 Ga. 86; mortgages: *Dyar v. Walton*, 79 Ga. 466; notes: *Dyar v. Walton*, 79 Ga. 466; a pledge: *Fairbank v. Nat. Bank*, 132 Ill. 121; a policy of insurance: *MacIntyre v. Cotton States Ins. Co.*, 82 Ga. 478.

CONTRACTS IN WRITING — CONSTRUCTION, A QUESTION FOR WHOM. — The construction of a written contract is a question for the court: *Beck v. West*, 67 Ala. 213; *Coquillard v. Hovey*, 23 Neb. 622; 8 Am. St. Rep. 134, and note; *Railway Co. v. Wynn*, 68 Tenn. 321.

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[IN BANK.]

FOX v. TAY.

[89 CALIFORNIA, 330.]

STATUTE OF LIMITATIONS AS DEFENSE — MATTERS DEEMED PLEADED BY REPLY. — Where the statute of limitations is pleaded as a defense, the matters upon which plaintiff relies for relief against such defense may be deemed to have been pleaded in his reply thereto.

STATUTE OF LIMITATIONS AS DEFENSE — TRUSTS. — Where a person during his lifetime, as executor, stands in the relation of trustee to a fund, and cannot plead the statute of limitations in respect thereto, his representatives, after his death, stand in no better position, and cannot plead the statute.

EXECUTORS AND ADMINISTRATORS — ACCOUNTING BY FOREIGN EXECUTOR. — Where the assets of an estate situated within a jurisdiction come into the hands of a foreign executor while residing within that jurisdiction, by voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction.

TRUSTS — APPLICATION OF FUNDS. — Where a trustee receives any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his co-trustee for investment or distribution; and if he does, he will be personally responsible for the acts and defaults of such trustee.

EXPRESS TRUSTS. — STATUTE OF LIMITATIONS does not begin to run in cases of express trusts until a repudiation of the trust.

EXECUTORS AND ADMINISTRATORS — TRUST — STATUTE OF LIMITATIONS. — Where an executor receives funds belonging to the estate, and gives his co-executors a note secured by mortgage for the amount, he is a trustee of the fund, and the statute of limitations does not run in his favor until he expressly repudiates the trust; nor does the fact that he was appointed in a foreign jurisdiction affect his relation as trustee to such fund received within the jurisdiction where the trust is sought to be enforced.

EXECUTORS AND ADMINISTRATORS — ACTION TO FORECLOSE MORTGAGE BY FOREIGN EXECUTOR. — Where a foreign executor, as trustee, has taken a note and mortgage from his co-executor for a fund received by the latter as belonging to the estate, he may maintain an action to recover the fund, and to foreclose the mortgage as mortgagee, without taking out letters testamentary in the jurisdiction where the mortgaged property is situated.

**ESTATES OF DECEDENTS — STIPULATION FOR DEPOSITIONS — WAIVER OF OBJECTIONS.** — A stipulation that depositions are to be taken subject to objection as to the propriety, relevancy, and materiality of the interrogatories contained therein, is not a waiver of an objection thereto on the ground that the testimony given is of facts occurring prior to the death of the decedent, to whose estate it relates, where the statute precludes witnesses from testifying to any fact occurring before the death of such decedent.

THE depositions referred to in the opinion were taken on commission in New York City, under stipulation that they should be taken on certain questions, "subject, however, to all objections as to the propriety, relevancy, and materiality of each thereof, and upon the express agreement that each party shall have the right, upon the trial of said action, to object to each and all of said interrogatories, upon all grounds of objection to the propriety, relevancy, competency, and materiality thereof, anything in the stipulation to the contrary notwithstanding." At the trial, nearly the entire matter contained in the depositions was ruled out on objection that it related to facts occurring prior to the death of the deceased executor, and was not admissible, under subdivision 3 of section 1880, California Code of Civil Procedure.

*Taylor and Haight*, for the appellants.

*A. N. Drown*, for the respondents.

THE COURT. After hearing in Bank and further consideration of the case, we are satisfied with the conclusion reached in Department One, and with the opinion there delivered by Mr. Justice Paterson.

The matters upon which the plaintiffs rely to relieve them from the bar of the statute of limitations may be deemed to have been pleaded in answer to the affirmative matters alleged in the answers of the defendants. There being no replication, such affirmative matters are taken as controverted: Code Civ. Proc., sec. 462.

The judgment and order are reversed, and the cause remanded for a new trial.

The following is the opinion above referred to, rendered in Department One on the 12th of August, 1890: —

PATERSON, J. Charles J. Fox was associated in business with G. H. Tay, Henry Brooks, and Oscar Backus, in San Francisco, up to the time of his death, which occurred in June, 1870. In his last will and testament he appointed the plain-

tiffs, A. J. Fox, Enoch Ketcham, and G. H. Tay, his executors. They all appeared before the surrogate of Union County, New Jersey, where Fox resided and died, and qualified as executors. An inventory was made out, signed, and filed by Fox and Ketcham in April, 1872, in which the estate was shown to consist of the mortgage hereinafter referred to, valued at \$33,000, and a one-fourth interest in the accounts of the partnership, amounting to \$17,802.92; but the latter, being considered nearly worthless, was valued at only \$1,000 in the inventory. After he qualified as executor, Mr. Tay returned to San Francisco, and entered into correspondence with the executors in New Jersey concerning the settlement of the interest of the deceased in the partnership business. On June 3, 1871, he executed and delivered to them the promissory note in suit for thirty-three thousand dollars, payable five years after date to "Enoch Ketcham and Alanson J. Fox, trustees," together with the mortgage sought to be foreclosed herein; and on the same day Fox and Ketcham gave to him the following receipt:—

"NEW YORK, January 3, 1871.

"Received from Tay, Brooks, and Backus \$33,000 for account of estate of Charles J. Fox.

ALANSON J. FOX.

"\$33,000.

E. KETCHAM."

During his lifetime Mr. Tay paid the interest every six months through his agent, J. W. Sullings, who was book-keeper for E. Ketcham & Co., of New York. The last check for this purpose was given January 11, 1883, and Mr. Tay died in April following. Although the interest money was sent in the name of George H. Tay & Co., it was charged to Tay's individual account on the books of the firm. In due time after the death of Mr. Tay, the surviving executors presented their claim to his executors, but, it appearing to the latter that the claim was barred by the statute of limitations, they declined to allow it. Thereupon this action was commenced.

By its terms the note matured January 3, 1876, and, of course, unless the relations of the parties to themselves and to the fund in controversy can be looked into, it became barred January 3, 1880. We think that the defendants were not entitled to claim the benefit of the statute of limitations. It is entirely clear to our minds that Tay, in his lifetime, occupied such a relation of trust towards the *cestuis que trustent* and executors under the will of Charles J. Fox, and to the fund which constituted the consideration of the note and mortgage



in suit, that he could not have pleaded the statute of limitations, and his representatives stand in no better position. In qualifying as executors before Tay left New Jersey, the executors promised on oath "to make and exhibit unto the surrogate's office of the county of Union a true and perfect inventory of all and singular the goods, chattels, and credits, as far as the same have or shall come to their possession or knowledge, or to the possession of any other person or persons, to their use, to their knowledge." Afterwards an inventory was filed, in which the estate was represented as consisting of this thirty-three-thousand-dollar note and mortgage, and one thousand dollars in accounts. It is true, this inventory was signed only by Fox and Ketcham, and there is nothing to show whether Tay had any knowledge of its contents; but the evidence shows conclusively, we think, that the latter always considered that the fund represented by the note and mortgages was a portion of the assets of the estate of Fox, deceased. Upon his return to California, Mr. Tay addressed a letter to Mr. Ketcham, in which he says, among other things:—

"*My Dear Ketcham*,—Yours of the 4th inst. is with me this A. M. Yesterday I received a letter from A. J. Fox, dated the 2d, both of about the same tenor, referring to and approving my proposition for the settlement of Charley's interest in our business. You will please write me at once, and tell me shall I make the mortgage in favor of Enoch Ketcham, trustee, or Alanson J. Fox, trustee, or Mrs. Emma F. Fox. My advice is, Ketcham or Fox. My advice as executor, of what I know would be the wish of Charley, as a friend of the widow and the little ones, is, Ketcham or Fox. All of my best judgment enjoins me to say Ketcham or Fox, and not Mrs. Emma F. Fox. If Ketcham, Fox, and Tay, as true friends of the dead Charley, wish the derivable income to be used economically, and to aggregate or enlarge for reinvestment and for re-accumulation, the mortgage should be in favor of Ketcham or Fox. . . . Write at once. . . . I trust the year upon which we have entered will be fruitful of happiness and prosperity for you and yours, my dear Ketcham, and that 1871 may be followed by very many more."

The letter from Fox, referred to, says: "Your proposition for the settlement of Charley's interest in the business of Tay, Brooks, and Backus seems to be a liberal one, and as favorable as he could expect. I have written to Mr. Ketcham that I am satisfied with your offer, and wish him to write you about

it, with such suggestions as to details, etc., as he might think best. . . . I am very glad to know that Charley's family are to have so ample a provision for their support." On the 1st of June, 1871, a statement headed "Charles J. Fox, in account with Tay, Brooks, and Backus," was sent to Ketcham and Fox, as executors of the estate of C. J. Fox, and signed by Tay, Brooks, and Backus, showing a balance to the credit of the deceased of \$35,839.46, and a one-fourth interest in accounts, amounting to \$46,692.21. Mr. Tay wrote on the back of the note and mortgage, which he sent to New Jersey, the following: "The within note and the mortgage given to secure its payment are held by us in trust for Emma F. Fox, widow, and — and —, minor children of Charles J. Fox, deceased, and in accordance with their respective interests under the will of deceased." The names "Louisa Fox" and "Sheridan Fox" were written in the blanks by the executors. The telegrams directing payment of interest specify the purpose in various ways, and one says: "Pay Ketcham interest Fox estate"; another, "Pay Tay's mortgage interest."

Mr. Sullings testified that the statements were forwarded to him in letters written by Mr. Try, in the name of George H. Tay & Co., and that he sent Mr. Tay a statement of the payments of interest; that Mr. Tay directed him, at the time he gave him a power of attorney, to pay the interest on the note and mortgage, and the other claims as they might arise, by giving checks on the Market National Bank, signed "George H. Tay & Co." For several years prior to the death of Fox, Backus and Tay were the only partners in the business. Mr. Backus testified that he had nothing to do with sending any telegrams, and knew nothing of any mortgage or any liability on account of any mortgage; that Mr. Tay had never spoken to him about any mortgage. The books of the firm were introduced in evidence, and Mr. Warner, one of the employees, testified that the items of interest therein pointed out were charged to the private account of Mr. Tay.

While Mr. Tay could not, by virtue of his appointment in New Jersey, administer upon any estate of Fox in this state, it was his duty to take charge of any personal asset of the estate which he found here, and send it to New Jersey for administration. Although a foreign executor may have no coercive power for the collection of assets in the jurisdiction in which he resides, yet if assets situated in that jurisdiction come into his possession by a voluntary payment or adminis-

tration, he is bound to account for them in the domiciliary jurisdiction: *Schouler on Executors*, sec. 175; *Parsons v. Lyman*, 20 N. Y. 103; *Wilkins v. Ellett*, 108 U. S. 258; *Wyman v. Halstead*, 109 U. S. 656. Mr. Tay took the interest of the deceased in the partnership to himself, and gave his note and mortgage in evidence thereof. The change of form did not, in our opinion, change the real character of the property, so far as it was related to the estate of Fox. The note and mortgage were simply an asset in another form. If Mr. Tay had sold the property to another, received the money, and given this note and mortgage to the other executors, he would still have remained in possession of a fund belonging to the estate; or if he had sent the purchase-money to the executors in New Jersey, and at his request they had returned it to him as a loan, he would not have been any more a trustee than he was by receiving and holding it without the money having changed hands. "If a trustee receive any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his co-trustee for investment or distribution; and if he do so, he will be personally responsible for the acts and defaults of such co-trustee": 1 *Perry on Trusts*, sec. 418. "By this rule, trustees may be liable to great losses, while they can receive no profit; and the rule is made thus stringent that trustees may not be tempted from selfish motives to embark the trust funds upon the chances of trade and speculation": 1 *Perry on Trusts*, sec. 429. If the money had been lost in speculation, all the executors would have been liable therefor. It was the duty of Tay to see that the estate received the fund which he had collected. It would still be his duty to do so if he were alive, and the fact that he had given a note and mortgage would be no defense to an action therefor, and the statute of limitations would be no defense. In case of an express trust, the statute does not commence to run until a repudiation of the trust: *Hearst v. Pujol*, 44 Cal. 235; *Janes v. Throckmorton*, 57 Cal. 388; *Broder v. Conklin*, 77 Cal. 339; *Bacon v. Rives*, 106 U. S. 99; 1 *Perry on Trusts*, sec. 863. Mr. Tay not only did not put himself in hostility to the trust, but recognized it by punctually paying the interest as it fell due up to the time of his death. By qualifying as trustee under the will of Fox, he became the trustee of an express trust. He was required by the terms of the will to invest the proceeds of the estate for the benefit of the wife and children of Fox, and he did so

by taking the fund unto himself, and paying interest thereon. The form in which the transaction was conducted could not wipe out the fiduciary relation. If he had kept the fund without giving any written promise, he would not have been released from his obligation to account to the estate of Fox, nor could he have shielded himself behind the plea of the statute of limitations without express, open repudiation of the trust. As stated before, it was as much his duty to protect and preserve the estate as it was the duty of his co-executors. The evidence all shows that Mr. Tay himself recognized this responsibility, and intended to live faithfully up to it. It cannot be said that he took no further action or interest in the matter than to qualify as trustee. His letters indicate the liveliest interest in the settlement of the estate, and in the welfare of the widow and children. There is no merit in the contention that the firm settled for the Fox interest in the partnership and sent the money to the executors in New Jersey. It is true that the receipt given by the executors would, unexplained, indicate that such was the fact, but the evidence in the case, considered as a whole, shows beyond a doubt that the executors never received anything on account of the thirty-three-thousand-dollar interest in the partnership, except the note and mortgage.

We do not think it was necessary for the plaintiffs to take out letters testamentary here. They are endeavoring herein to secure trust moneys which came into the hands of their co-trustee since the death of the decedent, and are prosecuting the suit as mortgagees under the terms of the mortgage made by the co-trustee himself. A trust will be enforced, if at all, only indirectly, and by the application of the rule of equitable estoppel: *Barton v. Higgins*, 41 Md. 546; *Brown v. San Francisco Gas Light Co.*, 58 Cal. 426; *Hall v. Harrison*, 21 Mo. 227; 64 Am. Dec. 225. The case of *Lewis v. Adams*, 70 Cal. 403, 59 Am. Rep. 423, does not hold contrary to this view. It is authority simply for the proposition that the executor cannot, as such, prosecute an action in a foreign jurisdiction on a cause of action accruing to his testator. Here the claim is not one which accrued to the testator, but it accrued to his executors after his death. It is an asset which came into the hands of the co-trustee without administration. He was entitled to receive it, and there being no claim of any kind, either by creditor or distributee in this state, it was his duty, and is the duty of his representatives, to turn it over for distribution ac-

cording to the laws of the state of New Jersey: *Estate of Apple*, 66 Cal. 432.

The court did not err in excluding the depositions. The appellants were precluded by the statute from being examined as witnesses "as to any matter of fact occurring before the death of Tay." The incompetency thus created is only limited and partial, and the parties could testify to any facts occurring subsequent to the death of Tay. We see nothing in the stipulations which operated as a waiver of the objections made at the trial. In view of what has been said, it is unnecessary to pass upon the question as to whether the acknowledgments alleged and proved had the effect claimed for them by the appellants. Judgment and order reversed, and cause remanded for a new trial.

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**LIMITATIONS OF ACTIONS — EXPRESS TRUSTS.** — So long as an express trust continues, the statute of limitations does not run in favor of the trustee: Note to *Frame v. Kenny*, 12 Am. Dec. 372, 373; note to *Chase v. Ourtright*, 22 Am. St. Rep. 213; or his personal representatives: *Commonwealth v. Motts*, 10 Pa. St. 527; 51 Am. Dec. 499; *Miles v. Thorne*, 38 Cal. 335; 90 Am. Dec. 384, and note 396. A personal representative is an express trustee: Note to *Haynie v. Hall*, 42 Am. Dec. 431. In *Sanchez v. Dow*, 23 Fla. 445, it is held that equity will bar demands which have become stale by lapse of time, although a trust is involved, if time and long acquiescence have obscured the acts of the parties, or other circumstances have given rise to presumptions unfavorable to its continuance.

**TRUSTS AND TRUSTEES — LIABILITY FOR ACTS OF CO-TRUSTEES.** — As to the liability of a trustee for the misconduct of his co-trustee, see *Fesmire's Estate*, 134 Pa. St. 67; 19 Am. St. Rep. 676, and note; *Walker v. Walker*, 88 Ky. 615; *Tichenor v. Tichenor*, 43 N. J. Eq. 163.

**FOREIGN EXECUTORS AND ADMINISTRATORS.** — As to when foreign executors or administrators may sue or be sued, see *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144; 20 Am. St. Rep. 461; *Fugate v. Moore*, 86 Va. 1045; 19 Am. St. Rep. 926, and note. Under the Revised Statutes of Wisconsin, a foreign administrator may have the same rights and remedies as one appointed in the state, upon filing his appointment or an authenticated copy thereof in any county court in the state: *Murray v. Norwood*, 77 Wis. 405. The New York rule that a foreign executor cannot sue or be sued in that state applies only to claims and liabilities resting wholly upon his representative character: *Johnson v. Wallis*, 112 N. Y. 230.

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## CASHMAN v. ROOT.

[89 CALIFORNIA, 373.]

**STOCK—CONTRACT FOR SALE OF STOCK ON MARGIN—RECOVERY OF MONEY PAID UNDER.**—A contract by which a stock-broker undertakes to buy and sell stocks for his customer, charging him with commissions and interest on the money advanced, and holding the stock as security until it is sold, the customer to receive or pay the difference between the buying and selling value of the stock, is a contract for its sale on a margin, and void within the meaning of a constitutional provision that a contract for the sale of stock on margin to be delivered at a future day is void, and that money paid on such contract may be recovered. In such case the customer may recover property conveyed to the broker as security for his advances, without returning such advances actually made.

**STOCK-BROKER AND CUSTOMER—RELATION BETWEEN—PURCHASE OF STOCK ON MARGIN.**—The relation between a stock-broker and his customer in the purchase and sale of stock on commission amounts to this, that the broker purchases the stock as the agent of his customer, and then holds it as a pledge to secure a debt; and if by the transaction the customer is enabled to purchase stock on margin, which is prohibited by law, the transaction is void.

*P. Reddy and W. H. Metson*, for the appellant.

*Charles J. Heggerty*, for the respondents.

**TEMPLE, C.** This action is brought to compel a conveyance to plaintiff of certain real estate, which it is averred was conveyed by plaintiff to defendant Root on the 18th of June, 1884, in trust, to secure the payment by plaintiff to defendant Hooker of any indebtedness which might exist within six months after the 14th of July, 1885.

The complaint alleges that plaintiff was not, at the commencement of the suit, and for a long time prior had not been, indebted to Hooker in any amount whatever.

Demand for a deed, and refusal, are also averred.

The answers admit that the conveyance was made in trust as charged in the complaint, but charge that plaintiff is still indebted to defendant Hooker in the sum of \$2,347.

Defendant Hooker was a stock-broker engaged in buying and selling mining stocks in San Francisco, on margin or otherwise, as required. Plaintiff had been a regular customer of Hooker for many years, and had lost heavily in stock speculations. Being, as Hooker testified, rather short of money, he conveyed the property sued for, in trust, to defendant Root, who was in Hooker's employ, to cover margins, and to enable plaintiff to continue his speculations in stock.

Hooker states that he valued it at about three thousand dollars, and to that extent plaintiff could buy on margin without actually putting up money.

They continued to deal together until Hooker's business was closed by his insolvency, in December, 1886, at which time Hooker held certain stocks for plaintiff, and according to Hooker's books, plaintiff owed him \$2,347.

Plaintiff does not dispute the correctness of the account according to the course of dealing between the parties or their understanding at the time, but claims that the debt is illegal and the contract to pay void, under section 26 of article 4 of the constitution of this state. It reads as follows: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

Plaintiff's dealings with Hooker were altogether on margin; when the estimated value of the land did not afford sufficient margin, it was put up in cash and was kept good as the market fluctuated. Upon purchasing stock, the cost price was charged to plaintiff, less the amount of margin put up in cash; when sold, his account was credited with the amount realized. He was, of course, charged with the broker's commissions and the interest on the money advanced.

The result, of course, was, that plaintiff, aside from the commissions and interest, simply received or paid the differences between the buying and selling values. It was not contemplated that he should ever receive the stock, although he might, had he been able, have paid his debt and demanded the securities at any time.

Stock ordered was always purchased by Hooker, paid for in full, and delivered to him, except when he had orders to sell the same stock for another customer, in which case the stock was simply transferred from one account to the other at market rates. The account was generally balanced monthly, when, as Hooker testified, plaintiff could tell whether he had lost or won in stocks. Hooker did not keep the stock of his customers separate or preserve its identity, but always had under his control sufficient to satisfy the claims of his customers.

It is evident from these facts that the only purpose of these dealings was to enable plaintiff to speculate in the fluctua-

tions of the market. If there were no break in the proceedings, it was indifferent to plaintiff whether any stock was bought or not, provided the entries were made in his account according to the market rates. It was quite a different matter, however, to Hooker. Had he not purchased, the transaction would have been a continuous wager between himself and his customer as to the future of the market. By purchasing he secured himself, and had no other interest than his commissions and the interest on his money.

So, too, had there been a break anywhere in the deal, it might have been important to determine whether the stock was purchased by Hooker as agent and belonged to plaintiff, or was purchased for himself simply to make himself safe upon his contract to give plaintiff the advantage of the fluctuations of the market.

The respondent contends that the relation of vendor and vendee did not exist between plaintiff and Hooker; that they neither bought nor sold stock to each other; that Hooker, as agent for plaintiff, purchased and paid for the stock, receiving immediate delivery for plaintiff, and thereafter held it subject to his order upon the payment of the price and commissions. The further contract, by which he held it as security for a loan, constituted the relation of pledgor and pledgee, which is not prohibited by the constitution.

This view was adopted by the learned judge of the trial court, and the findings are carefully drawn upon that theory. They find that the stock was purchased by Hooker as agent of and belonged to plaintiff, and that Hooker never sold stock to or bought from plaintiff. No part of the indebtedness, therefore, arose from the sale of stock on margin or otherwise.

This view of the relation between the broker and his customer in such a transaction is sustained by the weight of authorities in this country and in England, but the decisions are by no means uniform.

The first prominent case on the point is *Markham v. Jaudon*, 41 N. Y. 235. The question there was, whether the stock in the hands of the broker was a pledge. In order to determine this question, an analysis is made of the contract relations, separating the powers and obligations of the parties. It was held that the broker undertook, — 1. To purchase for his customer; 2. To advance the money required beyond the margin; 3. To carry the stock, the margin being kept good,



the customer to receive the gain or suffer the loss; 4. To retain the stock, or an equal amount of the same kind of stock; 5. To deliver to customer, when required, upon payment; or 6. To sell when required, accounting for the proceeds; that the customer contracts,— 1. To pay the stipulated margin; 2. To keep the margin good; and 3. To take the shares when required, and pay the amount due the broker.

This statement of the rights and obligations of the parties has been generally followed in other cases in which similar questions have arisen; and stock boards and brokers have adopted it as correctly stating the nature of the relation between broker and customer. It is evident, however, that the court in this analysis assumes the conclusion which it desired to reach. Its correctness has been questioned.

In that case there were two strong dissenting opinions, in which the relation between the broker and his customer was regarded simply as a contract relation, by which the fact of agency was ignored or denied. Mr. Justice Grover says: "The contract contemplated that the title should at all times remain in the defendants (brokers)." Mr. Justice Woodruff refers for his views of the relation to his opinion in *Morgan v. Jaudon*, 40 How. Pr. 366. He there states his opinion to be, that "it does not contemplate, in the first instance, that the customer shall ever acquire the title to the stock. It is a pure speculation in the rise and fall of stocks; . . . and the broker is employed to provide the means, either from his own funds, . . . or by borrowing in his own name and on his own credit, by pledge of the very stock which he buys, the required amount. And the whole expectation and intention of the parties is satisfied if when directed to sell he produces the required number of shares and sells them for the very purpose for which the speculation is made, viz., to realize the profits or determine the loss which results to the party employing him for that purpose. It is entirely clear that in these transactions the party employed, though he belongs to a class commonly called 'brokers,' does not act as broker merely. In such business they are more than brokers; and all arguments imputing to them a mere agency, so far as they rest upon the facts that they are called 'brokers,' are unsound and fallacious."

In Pennsylvania it has been held that the relation of principal and agent does not exist between the broker and his customer, but both are principals: *Ruchizky v. De Haven*, 97

Pa. St. 202; *North v. Phillips*, 89 Pa. St. 250; *Dickson v. Thomas*, 97 Pa. St. 278; *Gheen v. Johnson*, 90 Pa. St. 88.

In *Ingraham v. Taylor*, 58 Conn. 503, 18 Am. St. Rep. 291, it was held that the broker under such a contract was not bound to purchase the stocks at all. It was enough if he could procure them when called for, at the market rate, when ordered. It is said: "By such contracts the plaintiff bought the right to demand, at his option as to time, the delivery of shares at the price of the day of the agreement; the defendants, in consideration of his payments upon margins, assumed the risk of an undertaking to deliver shares upon demand at that price."

These citations are made to show that it is not universally admitted that the broker in such transactions purchases the stock as the agent of the customer. Looking at it from the point of view of the customer only, it is clear that by this device he has been able to purchase stock on margin. This phrase has come to have a peculiar or technical meaning among stock dealers; and it is applied to just these transactions between broker and customer.

It is a matter of public history that the constitutional provision was adopted just after a period of remarkable stock speculation, in which a large part of the community had been set wild with the apparent prospect of great gain, and the rapid fluctuations of stock afforded unusual inducement to stock-gambling. By skillful manipulation of the markets, a few fortunate ones had been able to take advantage of the existing mania and make large fortunes for themselves, at the cost of wide-spread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time through these very purchases on margin. Of these matters this court will take judicial notice, and doing so, cannot doubt that this inhibition was intended to strike down this practice.

If it does not do this, it simply beats the air. Although an isolated case or two might occur, where a transaction directly between vendor and vendee is upon like terms, certainly we know there was no practice of that kind which could have been regarded as an evil of sufficient importance to be prohibited in the fundamental law.

Such a prohibition is of little worth if it can be evaded by so simple a device. A party wishing to purchase on margins has but to interpose his broker, who is to carry the stock, in-

stead of the original owner. This would not diminish the evil. In fact, it is the very form of the evil mainly intended to be prohibited.

It may be said that if the relation be not one of principal and agent, but simply a contract relation by which the broker agrees to speculate in stocks, the customer indemnifying him against loss, and taking the profits, still there is no sale. It would be, it may be said, a contract to enable the customer to speculate in differences of market values. It is only sales on margin that are prohibited and made void.

It is not easy to characterize by a name the relation between the broker and his customer. For all ordinary purposes it may be admitted that the broker purchases as the agent of his customer, and then holds the stock as a pledge to secure a debt; but if by the transaction the customer is enabled to do that which is prohibited, to wit, purchase stock on margin, it must be held to be within the prohibition, and if Hooker did not himself sell to plaintiff, but was only the instrument through whom the illegal end was accomplished, he being privy to the design, the same result would follow: *Irwin v. Williar*, 110 U. S. 510. In the accomplishment of the unlawful purpose he took the place of the vendor, and carried the stock as the vendor might have done; and the end was thus reached *per interpositam personam*. The end attained, and not the form of the transaction, must determine the question.

It is claimed that it does not appear that the stock was the capital stock of a corporation or an association; but it is so found, and the respondent is in no position to complain of the finding.

We think the court erred in holding, from the evidence, that plaintiff was indebted to Hooker or his assignee. We therefore recommend that the order and judgment be reversed, and a new trial ordered.

FOOTE, C., and FITZGERALD, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the order and judgment are reversed, and a new trial ordered.

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CONTRACTS FOR SALES ON MARGINS. — If one employs a broker to purchase and sell merchandise for him, and the principal is required neither to receive the goods so purchased nor deliver those sold, but to receive from the broker the difference between what the goods were bought and sold for,

and the principal is to furnish a certain margin and pay certain commissions, such contract is a wagering contract, and void: *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159, and note; *Snoddy v. Bank*, 88 Tenn. 572; 17 Am. St. Rep. 918, and note; *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771, and note; *Clarke v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98, and note; *Burt v. Myer*, 71 Md. 467; *Alexander v. State*, 86 Ga. 247; *Coltrane v. Western Union Tel. Co.*, 83 Ga. 25. A person who puts up money with a broker to carry out such contracts cannot recover back the same: *O'Brien v. Lugnes*, 81 Me. 46; *Samuels v. Oliver*, 130 Ill. 72.

FOR AN EXTENSIVE DISCUSSION of the relation of principal and broker, see *Ingraham v. Taylor*, 83 Conn. 503; 18 Am. St. Rep. 291, and note.

## RESPINI v. PORTA.

[89 CALIFORNIA, 464.]

**LANDLORD AND TENANT — ABANDONMENT BY TENANT — RELETTING — MEASURE OF DAMAGES.** — The abandonment of leased premises by the tenant to the landlord before the end of the term, taking possession by the landlord against his wish, and the subsequent reletting of the property to another tenant, is not a surrender and termination of the first lease. In case of such reletting, the landlord is not entitled to recover for rent after the abandonment, but only compensation for the injury, and his measure of damages is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided the reletting was done in good faith.

**LANDLORD AND TENANT — ABANDONMENT OF PREMISES — ELECTION BY LANDLORD — MEASURE OF DAMAGES.** — A landlord, upon a wrongful abandonment of the leased premises by the tenant, may decline to meddle with the property, and at the end of the term sue for the rent; or, to avoid risk of damage to the property or the insolvency of the tenant, he may relet the property, and then recover, as damages against such tenant, the difference between the rent he was to receive and the rent actually received from the subsequent tenant.

**LANDLORD AND TENANT — ABANDONMENT OF PREMISES — DAMAGES LIMITED BY PLEADINGS.** — In an action by a landlord against his tenant to recover damages for abandonment of the premises before the end of his term, the landlord's recovery is limited to the amount claimed in his pleadings, and the court cannot allow additional damages due up to the time of the breach of the lease, but not claimed in the complaint.

*Joseph H. Skirm*, for the appellant.

*Z. N. Goldsby*, for the respondent.

**PATERSON, J.** On November 1, 1884, the plaintiff leased certain real and personal property to the defendant for the term of five years at an annual rental of two thousand four hundred dollars, payable quarterly in advance. The defendant entered into possession of the lands and held the same,

and paid the rent regularly for one year. On November 2, 1885, plaintiff demanded payment of the rent due for the first quarter of the second year, but the defendant replied that he had no more money, could not pay the rent, and was going to leave the place and give up everything. Plaintiff answered that he had not come to take possession of the property, but to ask for his rent; but if the defendant was going to abandon the property, he would take possession of the same to protect it. The defendant thereupon surrendered possession of the property to the plaintiff. A few days after the second day of November, 1885, the plaintiff leased the property to one Filippini at a rental of two thousand dollars per year, and the latter has ever since held possession, and paid rent at that rate.

This action was brought by the plaintiff to recover the sum of six hundred dollars, being the amount claimed to be due him from defendant on November 1, 1885, together with interest thereon at the rate of seven per cent per annum from that date.

The court below held that the defendant was entitled to a credit of five hundred dollars, the amount the plaintiff had received from Filippini.

It was properly held by the court below that the abandonment of the premises to the plaintiff, and the taking possession by him against his wish, and the subsequent letting of the property to another tenant, was not a surrender and termination of the lease under the circumstances. A landlord, upon a wrongful abandonment by his tenant, may, if he choose, decline to meddle with the property at all, and at the end of the term sue for the rent. He is not, however, driven to this course, and run the risk of damage to his property or the insolvency of his tenant.

In this case, the plaintiff pursued the right course in letting the property to Filippini, and we presume that he procured the highest rent that could be obtained. But we cannot support him in his contention that because the defendant, against his (plaintiff's) wishes and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant. Our code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detri-

ment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom": Civ. Code, sec. 3300. We think plaintiff's rights are measured by the provisions of this section, and not by section 3302 of the Civil Code. In cases of this kind, the landlord is not entitled to recover for rent of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting: *Gear on Landlord and Tenant*, secs. 128, 176; *Ledoux v. Jones*, 20 La. Ann. 540; *Bloomer v. Merrill*, 29 How. Pr. 259; *Randall v. Thompson*, 1 Tex. App. 1102; *Auer v. State*, 99 Pa. St. 370; 44 Am. Rep. 114; *Field on Damages*, 523.

Appellant contends that as nearly two years had passed between the time of the abandonment by the defendant and the trial of this action, the court below ought to have allowed the plaintiff about eight hundred dollars, that being the amount of damage up to that time caused by the defendant's breach of his obligation as lessee. The complaint, however, was filed on November 28, 1885, and no claim was made therein for anything beyond the amount of the first installment. Under the pleadings, the court could not allow any subsequent installments.

Judgment affirmed.

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**LANDLORD AND TENANT — ABANDONMENT BY TENANT.** — A tenant abandoning the possession of leased premises is liable for rent, if the tenancy remains undetermined: *Barlow v. Wainwright*, 22 Vt. 88; 52 Am. Dec. 79. If a tenant abandons the premises, the landlord may let them lie idle and recover rent for the whole term, or he may put an end to the lease by entry; if he does the latter, he can only recover the rent actually due at the time he takes possession: *Schuisler v. Ames*, 16 Ala. 73; 50 Am. Dec. 163. In *Bell's Estate*, 85 Cal. 119, the court decided that the abandonment of leased premises, and a declaration of intention by the lessee not to pay any more rent, without lawful cause, and without the consent of the landlord, did not change the relation of lessor and lessee, nor discharge the latter from his obligation to pay rent, even though the landlord might relet the premises for the benefit of the original tenant.

## CRIM v. KESSING.

[89 CALIFORNIA, 478.]

**JUDGMENT AS EVIDENCE.**—The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, and cannot be impeached when offered in evidence in another action, unless the record of the judgment shows that the court did not have jurisdiction of the subject-matter or of the person of defendant.

**JUDGMENTS — ORDER NUNC PRO TUNC — COLLATERAL ATTACK.**—Where the court orders an entry *nunc pro tunc* of an order made in an action substituting plaintiff's successor in interest as plaintiff, which order the clerk failed to enter in the minutes, the action of the court in ordering the entry *nunc pro tunc* is conclusive on collateral attack.

**COURTS — POWER TO CORRECT RECORD.**—Courts of record have inherent power to correct their records, so that they shall conform to the actual facts, and such corrections may be made at any time, without notice either upon motion of the court or of any party interested, and the record when so corrected, as well as the order making the correction, is conclusive upon any other court in which it is offered in evidence.

**JUDGMENT — MINUTE ENTRY OF DECISION BY CLERK DOES NOT CONSTITUTE — TIME OF ENTRY OF JUDGMENT — STATUTE OF LIMITATIONS.**—The entry by the clerk, on the minutes of the court, at the end of the trial, of the amount which plaintiff is entitled to recover in a foreclosure suit does not constitute the judgment, when findings are not waived. When such findings are filed by the court they constitute the rendition of the judgment, which the clerk, as a mere ministerial act, could thereafter, at any time, enter at length in the record of the court. The statute of limitations does not begin to run against such judgment until it is so recorded.

**JUDGMENT — AUTHENTICATION OF, BY SUCCESSOR OF JUDGE WHO RENDERED IT.**—A judgment need not be signed by the judge rendering it, and upon his failure to authenticate it during his term of office, it may be authenticated by his successor without impairing its effect.

**COURTS — POWER TO CHANGE CONCLUSIONS OF LAW BEFORE ENTRY OF JUDGMENT.**—The judge of the court, or his successor in office, may, at any time before the entry of judgment, change his conclusions of law upon the facts found; and in an action on the judgment it will be conclusively assumed that the judgment as entered was made after notice, and upon a proper showing.

**JUDGMENT — COLLATERAL ATTACK.**—An inconsistency between the findings and the judgment rendered by a court of record with jurisdiction of the case will not lay such judgment open to collateral attack.

**JUDGMENT — COLLATERAL ATTACK.**—From the time the court acquires jurisdiction until the entry of judgment, all steps taken by the court, however irregular, can only be remedied by direct proceeding.

**JUDGMENT.**—STATUTE OF LIMITATIONS does not begin to run against a judgment until its entry on the record of the court.

*Henry C. Firebaugh*, for the appellant.

*Blake, Williams, and Harrison*, for the respondents.

HARRISON, J. April 23, 1877, Carrie A. Beach commenced an action in the late twelfth district court upon a promissory note executed by the appellant, and to foreclose a mortgage on certain real property given to secure the payment of the same. May 20, 1882, the cause was tried upon the complaint and the answer of the appellant before Hon. J. M. Allen, who on the same day announced his decision, which was thereupon entered in the minutes of the court, but findings were not filed until December 29, 1882. The term of office of Judge Allen expired December 31, 1882, and on January 10, 1883, the court made an order *nunc pro tunc* as of March 20, 1882, that "Samuel Crim, the successor in interest of the plaintiff herein, be and he is hereby substituted as the plaintiff in this action, and that this action continue in his name as such plaintiff, in the place and stead of Carrie A. Beach, plaintiff therein." September 28, 1883, a judgment of foreclosure and for the sale of the mortgaged premises, signed by Hon. J. F. Sullivan, judge of said court, was entered of record in the cause. On the same day an order of sale was issued upon said judgment, under which the sheriff sold the mortgaged premises, and thereafter, on the seventeenth day of November, 1883, he made and filed his return of the same, showing a deficiency of \$947.17, for which amount judgment was on that day docketed against the appellant, and in favor of Samuel Crim. September 4, 1888, the respondents, as the executors of the last will and testament of said Crim, commenced this action against the appellant to recover the amount of said judgment. In his answer, the defendant denied the rendition of the judgment alleged in the complaint, and alleged that certain proceedings which had been taken in the case of *Beach v. Kessing* prior to the entry of the judgment were unauthorized, and without the jurisdiction of the court, and also pleaded the statute of limitations. The action was tried by the court without a jury, and judgment rendered in accordance with the prayer of the complaint. A motion for a new trial having been made and denied, an appeal has been taken to this court from both the judgment and order denying a new trial.

When the plaintiffs offered in evidence the judgment roll in the case of *Beach v. Kessing*, the defendant made various objections thereto, which were overruled. The admissibility of the judgment was to be determined by the court upon its inspection; and inasmuch as it was a judgment of the same



court, and in terms purported to be the judgment alleged in the complaint, in favor of plaintiff's testator, and against the defendant, in an action against the defendant, in which he had appeared, and of which the court had jurisdiction, the court committed no error in admitting it in evidence. The objection that the complaint was upon a judgment in an action wherein Samuel Crim was plaintiff, whereas the one offered in evidence was a judgment in favor of Carrie A. Beach, was answered by the fact that the judgment was entitled "Samuel Crim, substituted in place of Carrie A. Beach, plaintiff, v. John F. Kessing et al., defendants"; and after directing a sale of the mortgaged premises, adjudged that for any deficiency upon such sale "the clerk of the court docket a judgment for such balance against the defendant John F. Kessing, and that the defendant John F. Kessing pay to the said Samuel Crim the amount of said deficiency and judgment."

The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, unless the record itself of the judgment shows that the court did not have jurisdiction of the subject-matter of the action or of the person of the defendant. When the court has such jurisdiction, its record speaks absolute verity, because it is the court's record of its own acts; and such jurisdiction will be conclusively presumed, unless the contrary appears upon the face of the record. Whenever such judgment is received as evidence in another proceeding, it cannot be impeached; "for it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary": 3 Bla. Com. 24. In *Carpentier v. City of Oakland*, 30 Cal. 439, an action of debt was brought upon a judgment that had been previously rendered in an action between the same parties, and it was held in the court below that the defendant could not show that service of the summons had not been made upon it in the original action. In affirming this ruling, the supreme court used the following language: "The maxim of the law is, that the judgment of a court of general jurisdiction imports absolute verity, and its truth cannot be questioned, either by showing otherwise than by the record itself that the court had no jurisdiction, or that its jurisdiction was fraudulently procured. Both upon the merits of the cause of action and upon all jurisdictional facts, the record imports absolute verity in law, and is to be tried by the court

on inspection of the record only." In *Drake v. Duvonick*, 45 Cal. 455, a judgment in ejectment was offered in evidence, and it was objected to by the defendant upon the ground that no judgment had ever been rendered by the court, and that the clerk had no power to enter the judgment by default. The court said (p. 462): "Purporting to be a judgment of the court, and found regularly entered in its records, the presumption is, it was entered in pursuance of an order of the court. The rule is elementary that upon collateral attack all intendment is indulged in support of the judgments of courts of superior jurisdiction. Their records are conclusively presumed to speak the truth, and whatever is upon their records is presumed — the contrary not appearing — to be rightfully there." At the common law the only plea that was allowed to an action upon a judgment was *nul tiel record*, and the trial of this issue was by the record alone; "for, as Sir Edward Coke observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself": 3 Bla. Com. 331. Such answer was, in effect, pleaded by the defendant in the present case, but the record of the judgment itself, having been produced and received in evidence, established the allegations of the complaint.

Under our system of pleading, the defendant could have set up in his answer matter which would constitute an equitable defense to the judgment; but, as was said in *Carpentier v. City of Oakland*, 30 Cal. 439, "he must plead such defense as fully as if he were bringing a suit instead of defending one, . . . and file an answer which in matter of allegation would be a good bill in equity under the old system." An examination of the answer herein shows that it falls far short of this requirement, and in fact has not been regarded by the appellant either at the trial or on this appeal as an equitable defense to the judgment, within the rule above mentioned.

The appellant maintains, however, that the verity of the judgment is impeached by an inspection of its record, and in his argument maintains that the various proceedings that were had subsequent to the entry in the minutes in March, 1882, were without the jurisdiction of the court, and that the judgment as finally entered was void.

1. The court had jurisdiction to make the order of January

10, 1883, by which Crim was substituted as plaintiff in the place of Beach, and its action in making such order is conclusive against any collateral attack. All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself, or at the instance of any party interested in the matter. Ordinarily, a court would require notice of the motion to be given to all parties interested, but it has the power to make the correction without such notice. When made, the record so corrected, as well as the order making the correction, is conclusive upon any other court in which the record is offered in evidence: *Balch v. Shaw*, 7 Cush. 282. It appears by the order made in the present case that proof was made to the satisfaction of the court that at the trial of the cause, March 20, 1882, such order of substitution was in fact made, but had not been entered by the clerk. That court was the sole judge of the sufficiency of the proofs offered in support of the motion, and its action is conclusive, except in direct proceedings to vacate the order. The order making the substitution, being an order "relating to a change of parties," became a part of the judgment roll (Code Civ. Proc., sec. 670), and imported the same verity as the other parts of the record.

2. The clerk's entry in the minutes of the trial, March 20, 1882, did not constitute a judgment. It was only a record of a portion of the proceedings in the case. A judgment is the final determination of the rights of the parties in an action or proceeding": Code Civ. Proc., sec. 577. The complaint prayed for the foreclosure of a mortgage and the sale of the premises mortgaged to secure the payment of the note. The answer did not deny the execution and existence of the mortgage, but alleged that after the action had been commenced, and while it was pending, the defendant made a payment upon the principal of the note, and also of the costs of the action, and that it was then agreed by the plaintiff that the action should be dismissed. This was the only issue presented by the pleadings to be tried by the court; and the court, having found against the defendant upon this issue, ascertained the amount due upon the note, and ordered judgment for that amount. Both parties had appeared at the trial, and there was no waiver by them of findings of fact. Although the court then ascertained the amount of money

for which the plaintiff was entitled to a judgment, yet, inasmuch as the payment of that amount was secured by a mortgage, it was necessary that the judgment when entered should "direct a sale of the encumbered property, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff": Code Civ. Proc., sec. 726.

It would have been error for the court to enter a mere money judgment against the defendant for the amount then ascertained to be due on the note. Until after a sale of the mortgaged premises there could be no personal judgment docketed against him. The court did not, as is claimed by appellant, "refuse" the plaintiff any other relief than the money judgment. Its only action at this time was to determine the amount for which judgment should be entered, leaving the form of the judgment by which this amount should be collected until it should render its "decision" upon the whole case. The statute required its decision to be "given in writing and filed with the clerk": Code Civ. Proc., sec. 632; and in it the facts found and conclusions of law were to be separately stated: Code Civ. Proc., sec. 633. The "decision" upon which by section 633 the judgment is to be entered is that which by section 632 is to be given in writing and filed with the clerk; and until so given and filed there is no "decision" upon which judgment can be entered, and consequently no authority for entering any judgment. Accordingly, the judge before whom the case was tried made his findings of fact, and they were filed December 29, 1882. This was the rendition of the judgment which the clerk could thereafter at any time enter at length in the records of the court.

The entry of a judgment after it has been rendered by the court is but the ministerial act of the clerk. The judgment, when entered, becomes the record of what the court has determined, and then becomes as binding upon the parties as if entered immediately upon its rendition. "The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial": Freeman on Judgments, sec. 38.

Under the system of practice which prevailed in this state prior to the adoption of the codes in 1872, findings were not essential to the entry or validity of a judgment: Practice Act, sec. 180; and under that system it was held that the entry in the clerk's minutes of the decision as announced by the

court constituted the "rendition of the judgment": *Gray v. Palmer*, 28 Cal. 416; *Genella v. Relyea*, 32 Cal. 159. But under the provisions of the Code of Civil Procedure, whenever findings are required there can be no "rendition of the judgment" until they are made and filed with the clerk. Findings of fact, however, are required only "upon the trial of a question of fact," and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the "rendition of the judgment" in the same manner as it did under the former system. In the case of *Cook v. Cook*, which was under consideration by this court in *Estate of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, the defendant, after service of the summons upon him, made default, and the referee to whom the matter had been referred to take the necessary proofs having made his report, the court upon the hearing thereof made an order which was then entered in its minutes, decreeing a divorce between the parties to the action, and this court held that inasmuch as in case of a default findings are not required, the entry in the minutes constituted the "rendition of the judgment."

3. The subsequent authentication to the clerk by Judge Sullivan of the judgment to be entered did not impair its effect. The cause had been fully tried before Judge Allen, and he had rendered his decision before going out of office. The entry of the judgment upon that decision, being but a ministerial act, could be performed by the clerk after Judge Allen's term of office had expired, with as much effect as before: *Roberts v. White*, 39 N. Y. Sup. Ct. 272. There is no provision in our statute requiring any judgment to be signed by a judge, and it has been held that a judgment which is produced from the original records of the court in which it was rendered needs no signature or exemplification: *Clink v. Thurston*, 47 Cal. 29. The signature by the judge is "merely to give the clerk a surer means of correctly entering what has been adjudged": *Estate of Cook*, 77 Cal. 227; 11 Am. St. Rep. 267.

Whether if the clerk had, without any authentication from the court, entered the judgment which was subsequently entered, it would have been error, for the reason that in the conclusions of law made by Judge Allen there was no direction for a sale of the mortgaged premises, we are not called upon to decide in this case. The court could, at any time before

entry of judgment, change its conclusions of law upon the facts that had been found: *Condes v. Barton*, 62 Cal. 1; and such change could be made by another judge than the one who had tried the cause. The complaint contained a prayer for the sale of the mortgaged premises, and the findings of fact, taken in connection with the facts that were admitted by the answer, would have justified the court in giving such relief. If it were necessary for the court to give any notice of such action, we could assume that the form of the judgment as entered was made by the court after notice to the defendant, and upon a proper showing therefor. As was said by this court in *In re Cook*, 83 Cal. 418: "So long as the decree stands, it is conclusive as to all matters of evidence necessary to its validity." In *Sanford v. Sanford*, 28 Conn. 6, after the defendant had appeared in the action, the court, upon the motion of the plaintiff, had entered an order of nonsuit. Nearly two years thereafter, in the absence of the defendant, and without any proof appearing upon the record that notice had been given to him, the court proceeded to try the cause, and rendered judgment against him. In an action upon that judgment the supreme court of Connecticut held that the jurisdiction of the court must be presumed to have been properly exercised, and that its action in the exercise of such jurisdiction could not be collaterally impeached, saying: "If it were conceded to be necessary to the validity of the order of the court setting aside the nonsuit in question that notice of the motion for that purpose should have been given to the defendant, the presumption is, that such notice was given, and this presumption supersedes the necessity of an express statement to that effect on the record."

This principle is not affected by the fact that in the present case the court finds that the judgment in question was entered "without notice to the defendant, Kessing, and in his absence from court," since, as we have before seen, the judgment itself cannot be impeached by any evidence outside of its own record. Even an inconsistency between the findings and the judgment will not impair the judgment, "for the question whether the findings support the judgment — in other words, whether the judgment is erroneous — cannot be raised in a collateral action": *Johnston v. San Francisco Sav. Union*, 75 Cal. 139; 7 Am. St. Rep. 129. From the time that the court acquires jurisdiction of the defendant until the entry of the judgment, all the steps that are taken by the court are move-

ments within its jurisdiction, and however irregular such movements may be, they constitute only error, which must be remedied on a direct proceeding for that purpose.

It follows from the foregoing considerations that the objections made by the defendant to the sufficiency of the judgment cannot be sustained.

The only remaining question presented by the record is, whether the judgment sued upon was barred by the statute of limitations. This, however, we think cannot be considered an open question in this state. In *Trenouth v. Farrington*, 54 Cal. 273, it was expressly held that the statute of limitations does not begin to run until the entry of the judgment, and in *Condes v. Barton*, 62 Cal. 1, it was held that a judgment is not final until it is recorded.

The evidence of Crim, which was objected to, did not tend to vary or contradict the record. It was, in fact, immaterial, and it was not necessary that the plaintiff should have offered it. We do not think, however, that it could by any possibility have prejudiced the defendant: *Hobbs v. Duff*, 43 Cal. 489.

The judgment and order denying a new trial are affirmed.

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**JUDGMENT AS EVIDENCE.** — An adjudication of record is evidence against the world to establish the fact that such judgment was rendered, and of all the legal consequences necessarily resulting from the fact: *Faulcon v. Johnston*, 102 N. C. 264; 11 Am. St. Rep. 737; *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647, and note. A judgment is not available, however, as evidence in a subsequent action for another cause between the same parties to establish any fact not material to the adjudication of the former action: *Caulkape v. Parke*, 121 N. Y. 152; *Bowse v. Minnesota etc. Co.*, 44 Minn. 460.

**JUDGMENT, CONCLUSIVENESS OF.** — A domestic judgment of a court of general jurisdiction is presumed to be correct, and is not open to collateral attack: *Wilkinson v. Schoonmaker*, 77 Tex. 615; 19 Am. St. Rep. 803, and note. Judgments of courts of competent jurisdiction cannot be collaterally impeached, unless the record shows affirmatively a want of jurisdiction: *Williams v. Haynes*, 77 Tex. 283; 19 Am. St. Rep. 752, and note; *Pormann v. Frede*, 72 Wis. 226; *Toliver v. Morgan*, 75 Iowa, 619; *Bender v. Dumon*, 72 Tex. 92; *Schmidt v. Niemeyer*, 100 Mo. 207; *Thain v. Rudisill*, 126 Ind. 272; *Adams v. Franklin*, 82 Ga. 168.

**JUDGMENTS — NUNC PRO TUNC ENTRY.** — Judgments entered *nunc pro tunc* are binding to the same extent as though entered at the proper time, except as to parties who in the mean time have in good faith acquired rights without notice of any judgment: *Leonard v. Broughton*, 120 Ind. 536; 16 Am. St. Rep. 347, and note; *Barber v. Briscoe*, 9 Mont. 341; *Adams v. Higgins*, 23 Fla. 14; *Auerbach v. Giesecke*, 40 Minn. 258.

**COURTS, POWER OF, TO CORRECT THEIR RECORDS.** — The court may amend its record so as to make it conform to the truth, even after the term has expired: *Crow v. McCafferty*, 124 Pa. St. 200; 10 Am. St. Rep. 578, and note.

**JUDGMENTS—STATUTE OF LIMITATIONS.**—The statute of limitations begins to run against a judgment upon the rendition thereof: *MacKinney v. Doane*, 40 Kan. 676; *Dabney v. Shelton*, 82 Va. 349; *Dieffenbach v. Rock*, 112 N. Y. 621. A judgment is considered as rendered only when it has been entered of record: *Whitwell v. Emory*, 3 Mich. 84; 50 Am. Dec. 222; *Atina L. Ins. Co. v. Heiser*, 77 Iowa, 381; 14 Am. St. Rep. 297.

**JUDGMENTS—ENTRY BY CLERK.**—As to when a clerk is authorized to enter a judgment, and what judgments entered by a clerk are valid, see *Rockwood v. Davenport*, 37 Minn. 533; 5 Am. St. Rep. 872; *Powell v. Morley*, 98 N. C. 426; 2 Am. St. Rep. 343. In entering a judgment a clerk acts as a ministerial officer: *Smith v. Mayo*, 83 Va. 910. A judgment entered by a clerk under an order of the court on the same day is regarded as a judgment rendered by the court while in session: *Formann v. Frede*, 72 Wis. 226.

## LEONARD v. FLYNN.

[89 CALIFORNIA, 535.]

**EXECUTION SALE—CONVEYANCE OF PURCHASER'S INTEREST—EFFECT OF SHERIFF'S DEED TO GRANTEE.**—The sale of a purchaser's interest in land acquired by him under execution sale, before the expiration of the time for redemption, operates as an assignment of the sheriff's certificate of sale, and the subsequent execution of the sheriff's deed to the execution purchaser's grantee vests in him a perfect title.

**EJECTMENT—PLEA IN ABATEMENT—ORDER OF PROOF.**—Where, in ejectment, in addition to the defense of abatement by reason of the pendency of another action, other defenses, which go directly to the merits of the case are relied upon, the evidence upon the plea in abatement must be presented at the opening of the defense.

**EJECTMENT—SECOND ACTION ON AFTER-ACQUIRED TITLE.**—Two suits may be maintained against the same person at the same time to recover the same land, if the second suit is brought on title acquired after the commencement of the first. Hence the pendency of an action by one holding the equitable title is not a bar to another action by the same plaintiff against the same defendant for the same land, on an after-acquired legal title.

**EXECUTION SALE—STATUTE OF LIMITATIONS AGAINST PURCHASER.**—The statute of limitations does not commence to run against a purchaser of land at sheriff's sale until the sheriff's deed has been delivered to the purchaser.

**EJECTMENT—EQUITABLE ESTOPPEL.**—In ejectment by one having perfect title to the land, the fact that defendant, shortly after his entry, placed valuable improvements on the land, with the knowledge of and without objection by plaintiff, who knew that he claimed the land as his own, and who made no claim of any interest therein, will not constitute an equitable estoppel against plaintiff.

*Charles B. Younger*, for the appellant.

*Julius Lee*, for the respondents.

**GAROUTTE, J.** This is an action to recover possession of 16.73 acres of land described by metes and bounds, and situate in Santa Cruz County.



Defendant Eugene Flynn disclaims all interest and possession.

Defendant Patrick Flynn denies the allegations of the complaint; alleges title in himself; alleges that the cause of action is barred by the provisions of sections 312, 318, and 325 of the Code of Civil Procedure; "that another action is pending between the same parties, asking for the same relief; that for a long time prior to November 12, 1884, defendant's grantor was seised in fee and possessed of said tract of land, and upon said day she transferred her interest therein to defendant, who thereupon entered into the actual possession of said land, and ever since that time has had and now has the actual, exclusive, notorious, and adverse possession thereof, against all the world, claiming the same in his own right, and during said time has paid all the taxes assessed thereon."

Defendant also sets out facts which he claims constitute an equitable estoppel against plaintiff.

As conclusions of law, the court found, "that defendant and his grantor had been in the adverse possession of the land for more than five years prior to the commencement of the action; that plaintiff was not the owner and was not entitled to the possession thereof; that the action is barred by reason of the pendency of the former action; that plaintiff is estopped," etc.

This is an appeal by plaintiff from the judgment and order denying his motion for a new trial.

Plaintiff and defendant claimed title from a common source.

Plaintiff's title rests upon a sheriff's deed based upon a judgment and execution against Mary J. Roache, who was originally seised of the property in fee.

1. It is conceded that the proceedings of the sheriff in selling the tract of land under execution were valid; that Edward Briody was the purchaser at such sale, and the certificate of sale was issued to him December 13, 1873.

Briody conveyed to Margaret Curn, who was a grantor of plaintiff.

Defendant claims title by virtue of a quitclaim deed from Mary J. Roache, dated November 13, 1884.

The court found that Robert Orton, as ex-sheriff of Santa Cruz County, upon May 28, 1888, made a deed to Edward Leonard, based upon the aforesaid execution and sale of this tract of land.

Leonard at that time was the equitable owner of the land, under mesne conveyances from Briody.

The court further found that the deed from Briody to Curn was made July 11, 1874, and prior to the expiration of the time for redemption. The fact that the deed was made prior to the expiration of the time for redemption is immaterial, for it operated to transfer Briody's interest in the property, and was equivalent to an assignment of the certificate of sale.

In *Page v. Rogers*, 31 Cal. 301, Justice Sawyer, after an exhaustive examination of the law pertaining generally to this matter, held that the estate of a purchaser of realty at a judicial sale may be seized and sold under execution, and that, too, prior to the expiration of the time for redemption.

He says: "If a sale of a purchaser's interest after the time for redemption expires operates as an assignment of the sheriff's certificate of sale, a sale before the time expires must have the same operation."

To the same effect is *Green v. Clark*, 31 Cal. 591; *Ward v. Dougherty*, 75 Cal. 244; 7 Am. St. Rep. 151.

Upon May 28, 1888, Edward Leonard, claiming the property through mesne conveyances from Briody, the time for redemption having long since expired, and being the assignee of the certificate of sale by reason of these conveyances, certainly had a perfect equitable title to the realty as against Mary J. Roache, the judgment debtor, and all parties having notice of these matters, and was entitled to a deed of the property from the sheriff.

The deed of the sheriff, dated May 28, 1888, conveyed to him the dry legal title, which, in conjunction with his equity, gave him a perfect title, which he passed by conveyance to his grantee, the plaintiff here.

2. We will now examine the conclusion of the court "that there is another action pending between these parties involving the same subject-matter."

In a case such as we have under investigation here, where, in addition to the defense of abatement by reason of the pendency of another action, the defendant relies upon other defenses, which go directly to the merits of the cause, it would seem to be the better practice for the trial court to require the defendant to present his evidence upon his plea in abatement at the opening of his defense; for if proven to be meritorious, it would in many cases save much useless labor and great expense in litigating other defenses.

In addition to finding favorably to the defendant upon his plea in abatement, the court found that the plaintiff had no title, and was not entitled to the possession; that the plaintiff was estopped, and that the defendant had gained title by adverse possession; and proceeded to pass final judgment upon the merits of the action.

The defendant, by his answer, asked that this action abate by reason of the pendency of a prior action.

The court found that such action was pending, and instead of abating this action by reason of such fact, for all practical purposes, it proceeded to abate the prior action by adjudicating upon all matters involved therein.

It would be an absurdity for the trial court to hold that the action should abate, and then proceed at once to try it upon its merits, and render final judgment. This proposition needs no authority to support it; but *Larco v. Clements*, 36 Cal. 134, and *Coubrough v. Adams*, 70 Cal. 379, are directly in point.

In the former action between these parties, after the plaintiff had presented his evidence to the court, and rested, upon motion of the defendant he was nonsuited, and immediately thereafter filed the complaint in this action.

Respondent's contention that that action is not pending cannot be sustained in the face of the provisions of section 1049 of the Code of Civil Procedure, and also, if we may be allowed to speak *dehors* the record, in face of the fact that that case is now pending before us, under final submission, and ripe for decision.

Conceding that in all other respects these two actions are identical, yet the finding of the court in this regard must be set aside, because appellant acquired the legal title to the land in litigation after the commencement of the first action.

A plaintiff may have two suits against the same defendant for the recovery of the possession of the same land pending at the same time, if the second is brought on a title acquired after the commencement of the first: *Vance v. Olinger*, 27 Cal. 358; *Mann v. Rogers*, 35 Cal. 318; *Larco v. Clements*, 36 Cal. 132; *Murray v. Green*, 64 Cal. 368.

The finding of the court, therefore, that another action was pending between these parties, etc., is not supported by the evidence, and is erroneous; but this finding upon the question of abatement, being erroneous, presents the anomalous proposition that for that reason, perchance, the judgment should

be affirmed, for we are now compelled to examine respondent's defenses to the merits of the cause.

3. Plaintiff's grantor, as we have already seen, was not possessed of the legal title to this tract of land until he received the deed from the sheriff, May 28, 1888. He had no right of entry until that time, and it was only at that time that his cause of action accrued. The statute of limitations does not begin to run until the cause of action has accrued: *Collins v. Driscoll*, 69 Cal. 550. If he had no right of entry until 1888, it would be a harsh rule to hold that a title by adverse possession was undergoing the process of creation against him prior to that time; yet there are some reasons, and also authority from other states, supporting such rule of law: *Pratt v. Pratt*, 96 U. S. 704.

We will not enter into a detailed discussion of this question, owing to the fact that it is essentially a rule of property, and therefore it is of vast importance that the law as heretofore laid down by this court should be deemed unquestioned and conclusive.

"The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser": *Jefferson v. Wendt*, 51 Cal. 573.

For the foregoing reasons we deem it unnecessary to enter into a detailed examination of the evidence upon which the defendant relies to create his title by reason of an adverse possession for the period of five years.

4. The facts that defendant relied upon to constitute an estoppel, as shown by his answer, are, "that shortly after his entry upon this tract of land he placed valuable improvements thereon; that at that time plaintiff and his grantors well knew that he was making such improvements, and claimed the land as his own, and they did not object to the making of such improvements, nor did they, or any one of them, make known to him that they claimed any interest in said land."

The court found in conformity with the foregoing allegations, and, in addition, found that at the time plaintiff and his grantors knew their title, and that it was the same at the commencement of the action.

Neither the facts alleged nor the facts found are sufficient to constitute an equitable estoppel: *Boggs v. Morand Mining Co.*, 14 Cal. 279.

Let the judgment and order be reversed, and the cause remanded for a new trial.

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**EXECUTION SALE — EFFECT OF SHERIFF'S DEED TO PURCHASER'S GRANTEE.** — Where the purchaser, before receiving the sheriff's deed, conveyed the land to another person, and after receiving the deed conveyed the land to a different person, the sheriff's deed takes effect by relation from the day of sale, and the title thereunder inures to the benefit of the first grantee; *Hobnan v. Hobnan*, 66 Barb. 215, cited in note to *Jackson v. Ramsey*, 15 Am. Dec. 250. Equities against a purchaser at an execution sale will bind his assignee in relation to the same matters: *Ayres v. Campbell*, 9 Iowa, 213; 74 Am. Dec. 346. After land is bid off, and before any deed is executed or money paid, the bidder may consent that another person take his place as purchaser and receive the deed in his own name. The sheriff's deed to one thus substituted is valid: *Parler v. Johnson*, 81 Ga. 254.

**PLEA IN ABATEMENT — ORDER OF PROOF.** — After the parties have gone to trial on the merits, this plea is waived and cannot be taken advantage of; *Welch v. Thompson*, 39 Ga. 559; 99 Am. Dec. 470. When no action is sought or obtained at the first term of the court on a plea in abatement, it ordinarily operates as an abandonment of the plea: *Stevens v. Lee*, 70 Tex. 279.

**PLEA OF FORMER ACTION PENDING — WHAT NECESSARY TO SUSTAIN.** — To sustain such a plea, it must appear from the pleadings in the first action that it was for the same cause as the second, and necessarily involved the same question. It is not enough that the same property was in controversy: *Mandeville v. Avery*, 124 N. Y. 376; 21 Am. St. Rep. 678. Compare *Haskins v. Lombard*, 16 Me. 140; 33 Am. Dec. 645.

**EXECUTION SALE — STATUTE OF LIMITATIONS — WHEN COMMENCES TO RUN.** — The statute of limitations begins to run from the date of the sale: *Keaton v. Thomasson*, 2 Swan, 138; 58 Am. Dec. 55, and extended note. The statute of limitations commences to run from the entry into possession of the purchaser, and not from the execution of the sheriff's deed: *Garvin v. Garvin*, 31 S. C. 581; 17 Am. St. Rep. 48, and note.

**ESTOPMENT — EQUITABLE ESTOPPEL.** — Where a grantee under a voidable deed makes improvements with the knowledge of the grantor and after removal of the latter's disability, it is not necessary, to estop the grantor from disaffirming the deed, to show that he encouraged the improvements: *Legen v. Gardner*, 136 Pa. St. 588; 20 Am. St. Rep. 330, and note.

# CASES

IN THE

# SUPREME COURT

OF

# FLORIDA.

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## SOUTH FLORIDA RAILROAD COMPANY v. RHODES.

[25 FLORIDA, 46.]

**CARRIER OF PASSENGERS — SUFFICIENCY OF COMPLAINT AGAINST.** — A complaint in an action by a passenger against a railroad company for wrongfully expelling him from a train need not allege that at the time of his expulsion he was complying with the reasonable rules of the company, nor that he was not about to violate them.

**CARRIERS OF PASSENGERS. — REASONABLENESS OF RULES** prescribed by railroad companies and like corporations is a question of law to be decided by the court, and not by the jury.

**CONTRACT — CONSTRUCTION OF, WHEN A QUESTION OF FACT.** — Whether or not a contract entered into between a railroad and an independent line of steamers is a *bona fide* legal agreement, or was entered into for the purpose of creating an oppressive monopoly, is a mixed question of law and fact, and is properly left to the jury to determine.

**CARRIERS OF PASSENGERS — UNREASONABLE RULE.** — A rule prescribed by a railroad, inhibiting passengers from wearing on its cars the uniform caps and badges of the employees of another line of carriers, is not a reasonable rule. The expulsion of a passenger simply for wearing such cap or badge is illegal, and he is entitled to damages therefor.

**RAILROAD COMPANIES HAVE NO RIGHT** to prescribe the dress of any passenger.

**CARRIERS OF PASSENGERS — EXPULSION OF PASSENGERS.** — A statute providing that a railroad company, in ejecting a passenger for non-payment of fare, must do so at a usual stopping-place or near some dwelling-house, applies only to passengers who have not paid their fare. Passengers, for any other violation of the reasonable rules of the company, may be expelled at any convenient and safe point selected by the officer in charge, no more force being used than is necessary.

**CARRIER OF PASSENGERS — EXPULSION OF PASSENGER — EXCESSIVE DAMAGES.** — Where a passenger is unlawfully expelled from a railroad train, without malice or more force than is necessary to effect his expulsion, a verdict for five thousand dollars damages therefor is excessive, and should be set aside.

*S. M. Sparkman and S. T. Kingsbury*, for the appellant.

*George U. Walker*, for the appellee.

MITCHELL, J. This cause was tried at the fall term, circuit court, 1885.

The jury awarded the plaintiff five thousand dollars damages, motion for new trial made and overruled, and the case is before this court upon appeal from the order of the circuit court overruling said motion.

The first error assigned is, that the court erred in overruling the defendant's demurrer to the plaintiff's declaration.

The declaration alleges that on the twenty-fifth day of April 1885, the plaintiff was received by the defendants to be carried as a passenger on their cars from Sanford to Orlando, Orange County, Florida; that the defendants did not and would not carry the plaintiff as such passenger as aforesaid, but on the contrary, without reasonable and lawful excuse therefor, then and there, by their agent and servant, the conductor, and the train-hands of their said train, by force and arms ejected plaintiff therefrom, and left him, and proceeded on their said journey; wherefore the plaintiff was injured in his person and feelings, and was compelled to travel afoot about four miles back to said Sanford, was prevented from accomplishing his purpose to go to Orlando, and was otherwise greatly damaged. Plaintiff claimed twenty thousand dollars damages. Second count: Plaintiff claimed from the defendants the further sum of twenty thousand dollars for damages for that, whereas, heretofore, to wit, the 25th of April, 1885, the plaintiff was a passenger on the railway passenger-car of the defendants, and was, with force and arms, without just, reasonable, or lawful excuse therefor, ejected from the said car, and forcibly prevented from returning to the same.

The declaration was demurred to: 1. That it is bad in substance, in that it does not allege that the plaintiff, at the time it is therein alleged he was put off the defendant's cars, was complying with all the reasonable rules of said defendant; 2. That said declaration does not allege that plaintiff was not violating, or about to violate, any reasonable rule of said railroad company; 3. That plaintiff does not allege in his said declaration that the defendant has or usually keeps an office for the transaction of its customary business in the county of Orange.

# CASES

IN THE

# SUPREME COURT

OF

# FLORIDA.

---

## SOUTH FLORIDA RAILROAD COMPANY *v.* RHODES.

[25 FLORIDA, 40.]

- CARRIER OF PASSENGERS — SUFFICIENCY OF COMPLAINT AGAINST.** — A complaint in an action by a passenger against a railroad company for wrongfully expelling him from a train need not allege that at the time of his expulsion he was complying with the reasonable rules of the company, nor that he was not about to violate them.
- CARRIERS OF PASSENGERS. — REASONABLENESS OF RULES** prescribed by railroad companies and like corporations is a question of law to be decided by the court, and not by the jury.
- CONTRACT — CONSTRUCTION OF, WHEN A QUESTION OF FACT.** — Whether or not a contract entered into between a railroad and an independent line of steamers is a *bona fide* legal agreement, or was entered into for the purpose of creating an oppressive monopoly, is a mixed question of law and fact, and is properly left to the jury to determine.
- CARRIERS OF PASSENGERS — UNREASONABLE RULE.** — A rule prescribed by a railroad, inhibiting passengers from wearing on its cars the uniform caps and badges of the employees of another line of carriers, is not a reasonable rule. The expulsion of a passenger simply for wearing such cap or badge is illegal, and he is entitled to damages therefor.
- RAILROAD COMPANIES HAVE NO RIGHT** to prescribe the dress of any passenger.
- CARRIERS OF PASSENGERS — EXPULSION OF PASSENGERS.** — A statute providing that a railroad company, in ejecting a passenger for non-payment of fare, must do so at a usual stopping-place or near some dwelling-house, applies only to passengers who have not paid their fare. Passengers, for any other violation of the reasonable rules of the company, may be expelled at any convenient and safe point selected by the officer in charge, no more force being used than is necessary.
- CARRIER OF PASSENGERS — EXPULSION OF PASSENGER — EXCESSIVE DAMAGES.** — Where a passenger is unlawfully expelled from a railroad train, without malice or more force than is necessary to effect his expulsion, a verdict for five thousand dollars damages therefor is excessive, and should be set aside.



*S. M. Sparkman and S. T. Kingsbury*, for the appellant.

*George U. Walker*, for the appellee.

MITCHELL, J. This cause was tried at the fall term, circuit court, 1885.

The jury awarded the plaintiff five thousand dollars damages, motion for new trial made and overruled, and the case is before this court upon appeal from the order of the circuit court overruling said motion.

The first error assigned is, that the court erred in overruling the defendant's demurrer to the plaintiff's declaration.

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The declaration was demurred to: 1. That it is bad in substance, in that it does not allege that the plaintiff, at the time it is therein alleged he was put off the defendant's cars, was complying with all the reasonable rules of said defendant; 2. That said declaration does not allege that plaintiff was not violating, or about to violate, any reasonable rule of said railroad company; 3. That plaintiff does not allege in his said declaration that the defendant has or usually keeps an office for the transaction of its customary business in the county of Orange.

them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same questions, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the road and to the public."

That railroad companies have the power to prescribe such reasonable rules and regulations as may be found necessary in the conduct of their business is indisputable. The validity of the rule depends upon its reasonableness. If reasonable, it has the force and effect of law, but if unreasonable, it is not obligatory upon the public to obey it.

Webster defines a rule to be: "That which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things."

It is the duty of courts to pass upon and construe the laws of the land, and the reasonable rules and regulations established by a railroad being laws, — minor laws, — there is no good reason why the courts should not pass upon them and pronounce them reasonable and binding, or unreasonable and not binding, as the case may be.

The question as to whether the alleged agreement between the defendant and the De Bary-Baya Merchants' Line and the People's Line was a "*bona fide* agreement, and not entered into for the purpose of an oppressive monopoly," is a mixed question of law and fact, and was properly left to the jury to decide.

And if the alleged agreement was legal, the reasonable rules and regulations prescribed by the railroad company to enforce the stipulations of such agreement were also legal and binding; but if the agreement itself was not legal, it follows, of course, that the rules and regulations prescribed for the enforcement of the stipulations of the alleged agreement were also illegal, and not binding. The rule prescribed by the railroad company, inhibiting the wearing on their cars the uniform caps and badges of the officers and employees of the Independent Line of steamers, was not a reasonable rule, and hence not binding upon the persons wearing them; and if the company expelled any such passenger for wearing such cap or badge, such expulsion was illegal, and the passenger so expelled was entitled to damages therefor. Railroad companies

have no right to so prescribe the dress of any passenger. The court charged the jury that "the passenger should first be informed of the occasion and the necessity for leaving, and the train be brought to a stand-still, at any usual stopping-place, or near any dwelling-house, as the conductor shall elect."

This part of the charge is evidently based upon section 41, chapter 1987, Laws of Florida; but the section referred to applies solely to the expulsion of passengers from railway trains for non-payment of fare. It is not applicable to the case at bar, because the plaintiff was not expelled for not paying his fare. Under this charge of the court, the jury were compelled to find for the plaintiff. The plaintiff may have been guilty of the most immoral and indecent conduct; he may have been so intoxicated that he was offensive to other passengers; or his conduct may have been so violent as to endanger the lives of passengers and employees of the road,—and yet, under the charge, the company had no authority to expel him at any point other than a usual stopping-place, or near a dwelling-house. We do not understand this to be the law. The statute only requires passengers who refuse to pay their fare to be put off trains at a usual stopping-place, or near some dwelling-house, and is silent as to what points passengers for violating other rules of railroad companies may be ejected. In *Toledo etc. R'y Co. v. Wright*, 68 Ind. 586, 34 Am. Rep. 277, it is held that "a statute providing that if any railway passenger shall refuse to pay his fare, he may be ejected at any usual stopping-place, does not prohibit his ejection at any other safe point." And it is held by the supreme court of Illinois, in *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138, that the refusal of a passenger to surrender his ticket to the conductor, when demanded, does not constitute the same offense as the non-payment of fare; and the statutory prohibition against the expulsion of passengers for the latter offense, except at a regular station, does not apply to the former case. A railroad company may expel a passenger from its train at a place other than a regular station, for the violation of any reasonable rule other than that of non-payment of fare. When a passenger wantonly disregards any reasonable rule, the obligation to transport him ceases, and the company may expel him from the train, using no more force than may be necessary for such purpose, and not at a dangerous or inconvenient place. This

is a common-law right, and has been restricted by statute only in cases of non-payment of fare.

The same rule prevails in this state. A railroad company in ejecting a passenger for non-payment of fare must do so at a usual stopping-place or near some dwelling-house. This is the only restriction imposed by statute as to the expulsion of passengers; it applies only to passengers who have not paid their fare. Passengers for other violations of the reasonable rules of railroad companies may be ejected at any convenient safe point that may be selected by the officer in charge, no more force being used than is necessary.

There are many other objections urged against the charge of the court; but after carefully examining and considering the same, it is, in our judgment, unobjectionable, except as before stated.

The defendants requested the court to give numerous charges to the jury; some were given and others refused, and the refusal to charge as requested by the defendants is assigned as error.

These charges, except the ninth, were properly refused.

The ninth charge requested by the defendants was as follows: "That the reasonableness of a rule or regulation prescribed by a railroad company is for the court to determine, and not for the jury." This charge should have been given, and the court erred in not doing so.

The grounds in motion for new trial are, that the verdict was contrary to law, contrary to the evidence and the weight of evidence, contrary to the charge of the court, and that the damages awarded the plaintiff by the jury were excessive.

Now, as the case, for the errors mentioned, will have to be reversed and a new trial had, we do not desire or intend to express any opinion upon the evidence, except as to the amount of damages.

The evidence sent up in the record conduces to show that the appellee was ejected from the cars of the defendants April 25, 1885; that prior to said expulsion the appellants had entered into a contract or agreement with the De Bary-Baya Merchants' Line and the People's Line of steamers, plying between Jacksonville and Sanford, by which agreement the steamers of said lines were to await the arrival of the trains on the South Florida road, and that the trains were to await the arrival of the steamers of said lines; that the steamers were to procure freight and passengers for the

road, and that the road was to do the same for the steamers of said lines; that there was an opposition line of steamers running on the St. Johns River, between Jacksonville and Sanford, known as the Independent Line; that the competition between the railroad company and the steamship lines with which it had said agreement or contract, and the Independent Line, was very sharp; that the appellee, at the time, April 25, 1885, was purser on the steamer Chesapeake, one of the boats of the Independent Line; that the appellee drummed and solicited freight and passengers for the steamers of the Independent Line; that the appellee went on the docks of the defendants at Sanford for the purpose of soliciting business for the Independent Line, and that he went on the trains of the defendant railroad company for the same purpose; that the railroad company had established and published rules and regulations prohibiting such soliciting business on their said docks and trains; that the appellee had notice of the existence of such rules and regulations; that one of such rules prohibited the officers and employees of the steamers of the Independent Line from wearing the uniform caps and badges of said steamers on the trains of defendants; that on the 25th of April, 1885, the appellee did not himself purchase his ticket to go to Orlando, but had a friend to purchase it for him, stating at the time that he had reasons for doing so, which he would give at another time; that the appellee entered the cars of the railroad company, wearing the uniform cap of purser of the said steamer Chesapeake; that he entered the cars of the defendant just as the train was leaving Sanford; that shortly after leaving Sanford, the conductor, Anderson, went to the appellee and informed him that he was violating a rule of the company in wearing the cap he had on, and that he had orders to put him off the train if he did not take off the cap, and asked appellee if he would do so, and he answered that he would not; that the conductor then stopped the train, went to appellee again and asked him to leave the train, which appellee refused to do, and said that the conductor would have to put him off, whereupon the conductor put his hand on the shoulder of the appellee and started to lift him out of the seat, but the conductor found that appellee had fastened his feet under the seat just in front of him, whereupon the conductor called to his assistance the baggage-master and a brakeman, and proceeded to expel the appellee; that Rhodes still clung to the

seats, and that much force was required to expel him; that Rhodes, by so resisting, was bruised in several places, and that he was somewhat lame for two or three days; that after being so ejected, and just as the train was moving off again, Rhodes sprang upon the platform of the rear car, whereupon the conductor, assisted as before, again expelled him, and held him down in the sand till the train moved off and left him; and that Rhodes then walked back to Sanford, some four miles.

There was also evidence tending to show that the appellee went on the train of the defendants, expecting and hoping that he might be expelled therefrom, for the purpose of building a case of damages against the company.

This is only the substance of the evidence, but we think it sufficient to give a clear understanding of the case.

And now the question arises, How did the jury arrive at the conclusion that the appellee was entitled to five thousand dollars damages?

It is clear that if the appellee, at the time he was expelled from defendant's cars, had not violated or attempted to violate any reasonable rule of the railroad company, he was entitled to damages, either compensatory or exemplary. Did the jury find that he was entitled to only compensatory damages? and if so, upon what did they base their calculation? Wherein was it shown that from any and all causes the appellee sustained pecuniary loss to the amount of five thousand dollars? The evidence discloses no set of circumstances under which the appellee was entitled to five thousand dollars as compensatory damages. Did the jury intend to allow the appellee exemplary damages? and if so, upon what did they base their verdict?

Even admitting that at the time the appellee was expelled from defendant's train he had violated no reasonable rule of the company,—that he did not intend to violate any such rule,—and then wherein was he damaged to the amount awarded him by the jury? There is nothing in the evidence to show that any indignity was shown the appellee in ejecting him from defendant's cars, further than to use force sufficient to effect his expulsion; and in fact it is shown that the force used in putting the appellee off the train was only so much as was necessary to accomplish that purpose.

The circuit court charged the jury upon vindictive damages as follows: "Vindictive damages are not allowed, unless for

acts, accompanied with maliciousness, brought home to the intent of the company. If the expulsion be committed with willful violence or wrong on the part of the conductor as to the manner of putting off the train and in discharge of their duties, then exemplary damages may be given."

Now, where is there any "maliciousness" shown by the evidence which was "brought home to the intent of the company"? None such is shown, and this being the case, the verdict was contrary to the charge of the court.

The twelfth charge requested by defendant was as follows: "It is not necessary for a party who desires to test the right of a railroad company to eject him from its cars to do more than to express his dissent to such ejection, and if such passenger resist the effort to eject him, and receives personal injury occasioned by such resistance, and no more force was used by the agent of the company in expelling such passenger than was necessary to accomplish such expulsion, the passenger cannot recover against such railroad company for such injuries so received."

This charge was given as requested, and we think the charge was proper; and this being the case, how did the jury arrive at their conclusion, and award the plaintiff five thousand dollars damages? The testimony shows that the personal injuries received by the plaintiff in consequence of such expulsion were but slight, and it tends strongly to show that such injuries, so received by the plaintiff, were inflicted in consequence of his resistance to the officers of the company, and in finding as they did, the jury found contrary to the charge of the court.

The court refused to set aside the verdict; this was error.

Reversed.

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**CARRIERS OF PASSENGERS — REASONABLENESS OF RULES — WHEN A QUESTION FOR THE COURT.** — Where the facts are undisputed, the reasonableness of a railroad company's rules is a question for the court: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note.

**CARRIERS OF PASSENGERS.** — They may make and enforce rules, but they must be reasonable: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627; 4 Am. St. Rep. 776, and note. The right to be carried by a carrier of passengers is superior to rules and regulations that he can make, and is not affected by them: *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62. See also note to *Pittsburgh etc. R'y Co. v. Lyon*, 10 Am. St. Rep. 517. A company's rules should not be obstructive of the rights and convenience of passengers, nor enforced in an arbitrary or unreasonable way: *Baltimore etc. R. R. Co. v. Carr*, 71 Md. 136.

**COMMON CARRIERS — RIGHT TO DISCRIMINATE.** — A railroad company cannot grant to one line of hacks exclusive privilege to solicit upon its

grounds, as such a grant would be an unjust discrimination, tending to defeat competition and create a monopoly: *Kalamazoo etc. Co. v. Boston*, 88 Mich. 194; 22 Am. St. Rep. 693, and extended note.

**COMMON CARRIERS—EXPULSION OF PASSENGERS.**—A conductor may eject a drunken and disorderly passenger from the train at night, and between stations, if he does not leave him in a dangerous place: *Louisville etc. R. R. Co. v. Logan*, 86 Ky. 232; 21 Am. St. Rep. 332, and note; *Hall v. South Carolina R. R. Co.*, 28 S. C. 231. Under special statutes, conductors cannot expel passengers at other places than at regular stations: *Baldwin v. Grand Trunk R'y Co.*, 64 N. H. 596; *Illinois etc. R. R. Co. v. Latimer*, 128 Ill. 163.

**EXCESSIVE DAMAGES.**—As to what are excessive damages and what not, see *St. Louis etc. R'y Co. v. Finley*, 79 Tex. 35.

## STATE v. BARNER.

[2d FLORIDA, 292.]

**MANDAMUS—DISCRETIONARY ACT.**—Where the comptroller of state is invested with the legal duty of approving or rejecting the official bonds of county officers, his approval or rejection involves the exercise of judgment and discretion, and will not be controlled by *mandamus*, except for a capricious, arbitrary, or oppressive exercise thereof.

**MANDAMUS WILL LIE TO CONTROL DISCRETIONARY ACTS OF OFFICERS** only when the exercise of discretion is assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion, or when it is exercised capriciously, arbitrarily, or oppressively.

**MANDAMUS WILL NOT LIE TO CONTROL DISCRETIONARY ACTS OF OFFICERS** for wrong decisions, on the ground that wrong reasons are given therefor, except when the reasons relate to matters of law not within their discretion.

*M. C. Jordan*, for the relator.

*H. H. Buckman and William B. Lamar*, attorney-general, for the respondent.

**MAXWELL, J.** This is an original proceeding in this court.

The relator avers by his petition for *mandamus* that he was elected sheriff of Duval County at the general state election, November 6, 1888, and that, with a view to qualify for the office, as required by law, on the succeeding second day of January, he presented to the county commissioners of said county a bond for their approval, which, he alleges, had good and sufficient security. When presented, A. C. Toll, one of the sureties, appeared before the board and gave written notice that he desired to withdraw from the bond, whereupon relator withdrew the bond, but afterwards, on January 5th, again presented it to the board for approval, with the assent



of his sureties, but the board rejected it. Then, with the consent of the board, he again withdrew the bond, and entered into an additional bond, with, as he alleges, good and sufficient security, which in its terms was made a part of the former bond, the two to be deemed and taken together as his bond. These, with the assent of his sureties, were once more presented on the same day, and were accepted and taken together and approved by the board. It then being twelve o'clock, noon, he immediately telegraphed the comptroller that his bond had just been approved by the board, and that as no train would run the great distance from Jacksonville to Tallahassee till next morning, it would be impossible for him to present the bond for approval by the comptroller, but that it would be forwarded by the first train. Thereupon he took the oath of office, and on the following morning sent the bond, his oath of office, and his letter of acceptance, together with the commission fee, to be delivered to the proper authorities in Tallahassee. On the 7th of January, his attorney presented these to the state treasurer, in accordance with instructions previously given by the secretary of state, but the treasurer declined to accept the same until the bond had been accepted and approved by the comptroller, whereupon the bond, etc., were presented to the comptroller, when divers persons from the county of Duval appeared and objected to his approval of the same, on the ground that the conduct of Toll, as aforesaid, operated to discharge the other sureties from the bond, and render it void; which the relator contended was not the effect of said conduct, at the same time representing that all the sureties had full knowledge of Toll's conduct, and had assented to the same, and had authorized the presentation of the bond by the relator as his and their bond. To avoid the suspicion which had been cast on the bond, relator's attorney offered to procure from the sureties a written statement, of as high nature as the bond itself, that they had "full knowledge of the conduct of Toll, and that his said conduct was and is with their assent"; and the comptroller acceding to his request to that end, two instruments of writing, signed by the relator and his sureties, under seal, were procured and subsequently presented, in which they declare and affirm that they are still bound as obligors on the bond, regardless of the conduct of Toll, and said conduct is with their full knowledge and assent. On further consideration of the matter, the comptroller refused

his approval of the bond of relator, assigning his reasons as follows: "It appears that one Albert C. Toll, whose name is signed to the bond as one of the sureties, formally withdrew from it as such surety before it was accepted by the board of county commissioners; and such withdrawal, in my opinion, affects the liability of the other sureties, unless it is shown that at the time of such withdrawal, each of them expressly assented thereto. There is nothing on the bond, nor anything that properly belongs to or can be considered with it, that shows such assent on their part. To be a proper bond for approval, it must be complete in all the requirements within sixty days after the election of the officer. Any paper writing by the sureties renewing their obligation on the bond, and signifying their assent thereto and knowledge of such withdrawal, at a period subsequent to the acceptance of the bond, does not cure the defect. No obligation made nor assent given after the time allowed for completing the bond can be considered, when the time for making it is limited by law. Being satisfied, from a careful examination of all the papers and facts submitted, and from the legal advice I have received, that at the expiration of sixty days limited by the constitution for county officers to give bond and qualify, the instrument under consideration was such as to raise serious doubt as to whether a recovery could be had upon it in the event of a suit, I feel compelled to hold that it is not such a 'legal, sufficient, and proper' bond as to justify my approval."

The relator avers that the bond was a "good, sufficient, legal, and proper bond," and that the comptroller had decided that it was filed with him within the time limited by law for the qualification of relator for said office.

The return of the comptroller is, that the facts recited do not entitle the relator to a *mandamus* against him, and excluding the sufficiency of the bonds, he admits all the facts, except the allegations that he had decided that the bond was filed with him within the time limited by law for the qualification of relator as sheriff of Duval County.

To the return the relator demurred, partly as to matter of form; which it is not necessary to consider, but mainly because it does not show sufficient legal cause for refusing obedience to the alternative writ.

The matter to be determined is whether, under the facts of the case, *mandamus* will properly lie. The constitution

provides that a sheriff shall be elected in each county of the state, and in section 7, article 8, that "all county officers . . . shall, before entering upon the duties of their respective offices, be commissioned by the governor; but no such commission shall issue to any such officer until he shall have filed with the secretary of state a good and sufficient bond, in such sum and upon such conditions as the legislature shall by law prescribe, approved by the county commissioners of the county in which such officer resides, and by the comptroller. . . . If any person elected or appointed to any county office shall fail to give bond and qualify within sixty days after his election, the said office shall become vacant." The legislative enactment as to those offices directs that the bond shall have not less than two sureties, and shall be given to the governor and his successors in office; and as to sheriff, "that the sheriff of each county shall give bond in a sum to be fixed by the board of county commissioners of his county, which shall not be less than two thousand dollars nor more than ten thousand dollars": Acts 1887, c. 3724, sec. 4.

No objection is made to the bond for defect in any of these requisites, except such as appear in the reasons given by the comptroller for refusing to approve it.

Whether we can review those reasons and put the comptroller to further action if we find them insufficient is the first question to be considered.

The approval of a bond by the comptroller necessarily involves the exercise of judgment and discretion. It is not a ministerial duty of such sort that he can perform it by simply receiving the bond and indorsing his approval thereon. He must decide whether it is in form, whether the penalty and condition are such as the law requires, and whether the sureties are sufficient, and if there is a question as to its legality, he must decide that. The constitution does not express what is included in "approved . . . by the comptroller," but the legislature, in its act above cited, amplifies, though really meaning no more. In section 10 of the act is this: "Every such bond shall be approved by the board of county commissioners and by the comptroller, when they and he are satisfied in their judgment that the same is legal, sufficient, and proper to be approved." He must exercise his judgment to satisfy himself, among other things, that the bond is a "legal" one, and having come to the conclusion in this case that it was not, this court is asked to pronounce that

conclusion wrong, and to compel him to act upon our judgment.

The rule long established, and governing this state, is thus given by Mr. High: "In all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, *mandamus* will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And wherever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by *mandamus* to set them in motion and to require their action upon the matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by *mandamus* to control or dictate the judgment to be given": High on Extraordinary Legal Remedies, sec. 42. See *Towle v. State*, 3 Fla. 202; *State ex rel. v. Van Ness*, 15 Fla. 317; *McWhorter v. Pensacola etc. R. R. Co.*, 24 Fla. 417; 12 Am. St. Rep. 220.

While the rule is admitted by relator's counsel, he claims that there are exceptions to it; but the authority he quotes says: "Perhaps the exceptions are more apparent than real, and involve only cases where the discretion required to be exercised, while to some extent involving the examination of questions of fact and the drawing of conclusions therefrom, is regarded as ministerial rather than judicial": Note to *Weeden v. Town Council of Richmond*, 98 Am. Dec. 375. The purport of this may be better understood when the author, instancing a case where the law confers a right upon a person on performing certain acts, and designates another person or some tribunal to concede the right or issue evidence of it, when shown that the acts were done, proceeds to say that if the examining person or tribunal should "capriciously determine that the acts have not been performed" and there is no appeal, the court should "compel the requisite action by *mandamus*." This is scarcely different from the rule that where the thing to be done is merely ministerial, if the party whose duty it is to do it refuses, the court will compel him to act, — a capricious determination being equivalent to a refusal to act. The case of *State v. Lafayette County Court*, 41 Mo. 221, was one where the court evidently applied *mandamus* because the action of the county court in refusing to approve

a sheriff's bond was deemed "capricious," if not "arbitrary or oppressive." The case of *Stockton etc. Railroad Co. v. Stockton*, 51 Cal. 328, was one where the writ was granted because, in the view of the court, "if an official duty is to be performed on the happening of an event, the officer cannot arbitrarily or capriciously refuse to perform it after the event has happened, on the plea that he is not satisfied that it has happened." Where the court, in *Virginia v. Rives*, 100 U. S. 313, says that "*mandamus* does not lie to control judicial discretion, except where the discretion has been abused," it does not state what would constitute an abuse; but what is usually meant must have been intended, — the exercise of discretion capriciously, arbitrarily, or oppressively, and not any impartial and deliberate exercise of it, wrong only from resulting in erroneous judgment. If the discretion in cases like this can be controlled at all, obviously the control must be for reasons like those that give control of judicial discretion, the discretion in a ministerial officer being *quasi* judicial.

Other cases cited to this point by the counsel for relator — *Rex v. Justices etc.*, 1 W. Black. 606, *Dawson v. Thruston*, 2 Hen. & M. 132, *Delaney v. Goddin*, 12 Gratt. 266, *Randolph v. Stalemaker*, 13 Gratt. 523 — were cases in which the duties to be performed were merely ministerial and without discretion as to the matter on which action was taken in refusing to perform the duty, and on that account falling under the ordinary rule which authorizes *mandamus* against a ministerial officer not vested with discretion, to compel him, in case of refusal, to perform the act enjoined by law.

One of these cases, *Dawson v. Thruston*, 2 Hen. & M. 132, will illustrate the reason for granting *mandamus* when the matter on which action is taken in refusing to perform a duty is not involved in the duty. Under a statute of Virginia it was made the duty of the county justices to admit deeds to record. Objection was made to the record of a deed offered by Dawson, on the ground that his authority as trustee, to make it and dispose of the property, had ceased on the death of the party who created the trust. Without giving particulars, there was a question whether the deed could be operative for the purpose for which it was made, and the justices to whom it was presented for record, acting upon the fact that an injunction had been granted against Dawson to restrain him from making any disposition of the property, under the deed of trust, and thinking Dawson's deed could not be op-

erative, for that reason refused to admit it to record. His application to another court for a peremptory *mandamus* against the justices, to compel them to admit his deed to record, was denied; but on appeal the supreme court directed that the writ be awarded, holding that the duties of the justices, as to that matter, were "merely ministerial to the proof and recording of the deed," and that "the contents of the deed . . . are not a subject for their inquiry, much less the operation and effect of it." In other words, when the duty is ministerial only, the officer should not step outside of that to exercise his discretion on something not pertaining to the duty, though affected by its performance, but should proceed, irrespective of the outside matter, to perform the duty, else *mandamus* will compel him to do so. The other cases are to the same effect, and none of them furnish exceptions to the general rule which forbids courts to assume control of official discretion in its nature judicial or *quasi* judicial.

A further contention for the relator is, that *mandamus* is the "proper remedy for compelling the approval of official bonds, where it appears that the officer or the court invested with discretionary authority has acted mistakenly or unwisely by the reason given for refusing to approve, and which thus resolves itself into a question of law." This, as we understand it, is entirely subversive of the rule itself. If official discretion cannot be controlled or overridden by *mandamus* except for abuse of it, what matters it in any given case that the discretion has been guided by a mistaken reason? The prohibition to interfere does not lose its force because a wrong reason has led to a wrong conclusion. The books abound in cases where the courts refuse *mandamus* notwithstanding the mistake or error of the officer whose discretion is sought to be controlled, and it would be an anomaly to hold that refusal is proper where only a wrong conclusion is reached without giving the reason for it, but not proper if the reason be given and it is found not a good one.

Looking to the authorities quoted to sustain the contention for relator, the first — *State v. Lafayette County Court*, 41 Mo. 221 — must be discarded, because the writ was granted there to relieve against abuse of discretion. *Nelson v. Edwards*, 55 Tex. 389, was a case in which the court said that if the bond offered by Edwards was rejected by the commissioners to approve, because, in their opinion, Nelson was entitled to the office, *mandamus* would lie, — evidently because the commis-

sioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office. *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49, was a case where the clerk whose duty it was to approve sheriffs' bonds refused, because another was in the office claiming title to it. Like the last case, the discretion exercised extended to a question of contested title to office, and the court held that *mandamus* was proper, as a *prima facie* showing of title was sufficient to entitle the applicant to approval of his bond, — otherwise sufficient. *Case of Prickett*, 20 N. J. L. 134, was another similar case of disputed title to office, as was also the case of *Beck v. Jackson*, 48 Mo. 117. *Daniels v. Miller*, 8 Col. 542, was a case where the clerk refused to approve an appeal bond because the court held that appeal did not lie. The supreme court, holding that the law did not allow appeal in the case, ordered *mandamus*. *State ex rel. v. Lewis*, 10 Ohio St. 128, was a case where the officers to approve sheriff's bond refused because, in their opinion, the bond was not presented within the time for approval required by law. The court, holding that the commissioners mistook the law as to the time for presenting bonds, granted *mandamus*. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321, was a case where the clerk refused to approve an attachment bond because the sureties were non-residents of the county. The law of the state not requiring sureties to be residents of the county, the court, to relieve against the mistake of the clerk, granted *mandamus*.

The last two cases resting on mistake of law, it is important to observe that it was law not connected with the sufficiency of the bond, as to its form, legality, and sureties, and therefore law outside of the discretion given for the approval of bonds. The use of *mandamus* in such cases does not conflict with the general rule. And in regard to all these cases, it will be seen that what appears to be a departure from the rule is not so in fact. They only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion.

It remains to adjust the present case to our view of the law as herein expressed.

It cannot be said that the respondent, in refusing to approve relator's bond, acted capriciously or arbitrarily. It appears from the petition itself that he was indulgent to relator,

giving his counsel, when asked, time and opportunity to present the case in its fullest merits, and even to fortify it by supplemental papers. And respondent, in his return, states that he had legal advice to aid him in his decision; so there is every indication that he exercised his discretion with due deliberation and in good conscience, and there is no suggestion that he did not. It is not a case, then, in which it can be justly claimed that the law authorizes *mandamus* because of capricious or arbitrary action.

Nor is it a case calling for *mandamus* because respondent went out of the way to exercise his discretion on any question not properly within it, or because he gave a reason, if a wrong one, for his decision, on a question to which his discretion did not properly reach. In either case, we have seen that *mandamus* has been allowed. But it should not be here, because the discretion was exercised, and the reason for the decision given, on questions which were of the very essence of the sufficiency of the bond. Was it, after the action of Toll in withdrawing from it as surety, a legal bond? That was one of the questions, and certainly one of vital importance, on which it was his duty to pass judgment. Another was, Did the assent of relator and his sureties to the withdrawal of Toll, and their reaffirmance, by subsequent papers, of their obligation on the bond, notwithstanding his withdrawal, restore its validity, if that had been lost? The latter question was one addressed to his judgment, when he had concluded in his mind that, as the matter previously stood, the bond had become invalidated; and it was his duty to decide this also.

Here, then, we have questions to be determined, undoubtedly and necessarily within his discretion. He could not approve or disapprove the bond, one or the other of which the law made it his duty to do, without determining these questions. The distinction between this and the cases referred to is, that in those there could have been approval or disapproval of the sufficiency of the bond without considering the questions on which the refusal to approve was based, while in this, as we have said, this could not have been done. It seems to us that in such a case we are bound by the rule that the discretionary action of officers must be left free from control, unless there has been abuse of discretion.

It results from the foregoing conclusions that it is unnecessary to consider whether or not the respondent was mistaken



in his decision on the legality of the bond, for even if wrong, it cannot be rectified by *mandamus*. Nor is it necessary to consider other questions presented and argued, as, for the reasons indicated above, the alternative writ, to which the demurrer reaches back, does not disclose a case within this remedy. The judgment will be, that the alternative writ be quashed, and that the relator pay the costs of this proceeding: High on Extraordinary Legal Remedies, sec. 526.

**MANDAMUS — DISCRETIONARY ACT OF OFFICER.** — *Mandamus* will lie to compel an auditor to perform a discretionary act only when he has been guilty of a manifest abuse of discretion: *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 249, and note. *Mandamus* will not lie to review the act of an officer, when the duty he is called upon to perform requires the exercise of an act of judgment on his part: *Sansom v. Mercer*, 68 Tex. 488; 2 Am. St. Rep. 505, and note. *Mandamus* will not issue to compel a state auditor to certify municipal bonds, until a strict compliance with the statute is shown: *State v. Babcock*, 25 Neb. 500. *Mandamus* will not issue to compel a state auditor to issue a certificate of indebtedness, where there are claims to the certificate adverse to those of the plaintiff: *Livingston v. McCarthy*, 41 Kan. 20. *Mandamus* will not lie to compel a state auditor to issue a warrant in any larger sum than that allowed by the board of examiners: *County of Lyon v. Hallock*, 20 Nev. 326. A state comptroller will not be compelled by *mandamus* to issue his warrant upon the treasury for a bill of costs in a felony case, certified upon a void judgment against the state: *Morgan v. Pickard*, 86 Tenn. 208. The discretion of the superintendent of insurance, in granting, refusing, or revoking licenses to insurance companies, cannot be controlled by *mandamus*: *Dwelling-House etc. Ins. Co. v. Wilder*, 40 Kan. 561.

## COFFEE v. STATE.

[25 FLORIDA, 561.]

**CRIMINAL LAW — PRELIMINARY EXAMINATION — NEGLECT TO INFORM ACCUSED OF HIS LEGAL RIGHTS.** — It is the duty of a justice of the peace presiding at the preliminary examination of a person charged with crime to caution the latter that statements or confessions there made by him may be used against him, and to inform him of his legal rights in the premises. Unless he is so cautioned and informed, a confession made by him at that time is not admissible in evidence on his subsequent trial.

**CRIMINAL LAW — ADMISSIBILITY OF CONFESSIONS.** — Before the confessions of one charged with crime are admissible in evidence against him, it must be shown that such confessions were freely and voluntarily made, and when admitted, they should be acted upon by the court and jury with great caution.

**CRIMINAL LAW — CONFESSIONS — PRESUMPTION.** — When the confession of an accused has, in the first instance, been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown.

**CRIMINAL LAW — CONFESSION AS EVIDENCE.** — A confession made by an accused at his preliminary examination without being informed of his legal rights, or the aid of counsel, and in the presence of those to whom he had confessed the day previous under threats and fear of his life, is not admissible in evidence on his trial, in the absence of proof clearly showing that the second confession was not made under the influences inducing the first.

**CRIMINAL LAW — EVIDENCE MUST FOLLOW ALLEGATIONS.** — When a person is put on trial, he is entitled to a plain statement of the offense with which he is charged, and the evidence must be confined to that offense.

*O. T. Green*, for the plaintiff in error.

*William B. Lamar*, attorney-general, for the state.

**MITCHELL, J.** The plaintiff in error was jointly indicted with Paul Barco and Holmes Jacobs for the murder of Henry B. Hammond, and the case was tried at a special term of the circuit court of Marion County, in the month of January, 1889. A severance was granted, and the plaintiff in error alone was tried.

The issues were submitted to a jury, who convicted Coffee of murder in the first degree, and the sentence of death was passed upon him, and he now brings his case before this court on a writ of error, and assigns the following errors: —

1. The court erred in allowing the confession of the plaintiff in error — made at Martel, Florida — to go to the jury against the objection of the plaintiff in error, it being evident that said confession was not voluntary, having been induced by fear or the hope of favor.

2. The court erred in overruling the motion of the plaintiff in error to exclude the confessions of the plaintiff in error from the jury, it being evident it was not voluntary, and there being no evidence to remove the presumption that the influences inducing the first two confessions continued.

3. The court erred in overruling the plaintiff in error's motion for a new trial. The first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth grounds in said motion are not insisted on.

The evidence set up in the transcript of the record tends to show that on the thirteenth day of June, 1888, a difficulty occurred between the plaintiff in error, Coffee, and Henry B. Hammond, at Cotton Plant, in Marion County. The difficulty occurred about a small sum of money which Coffee claimed Hammond owed him. Coffee demanded the amount of Hammond, who refused to pay it, saying that he was en-

titled to a credit of thirty cents; angry words ensued, each of the parties cursing the other, when they clinched and fell upon the ground, when Coffee struck Hammond several times with the handle or staff of a buggy whip; some other party interfered, and the parties engaged in the fight were separated, and Hammond, who was on the bottom in the fight, after getting up, seized a piece of board, when Coffee hurriedly left, going in the direction of his home, saying at the time, either that he had given Hammond h—l, or that he would give him h—l; that Hammond was at the time clerking for one Fant, at Cotton Plant, and that he slept in a back room of the store where he was clerking; that some time from one to three o'clock on the morning after the difficulty between Coffee and Hammond, Fant's store was discovered to be on fire; that it had nearly burned down at daylight, when the first persons visited the place; that there were in the ruins of the store—the back part, or shed room, where Hammond slept—the charred remains of a human being, so disfigured that none of the witnesses were able to recognize them; the skull was whole with the exception of a hole in the front, which one of the witnesses says was burned; some ten feet from where the remains were found, in searching in the fire, some one found the watch and chain usually worn by Hammond, both of which were smoked and the watch partly melted, the hands of which showed that it ceased to run at three o'clock; that owing to the difficulty between Coffee and Hammond on the previous day, suspicion attached to Coffee, and parties set out to arrest him, and they found him concealed in the loft of a house; he was arrested and carried to Cotton Plant, where the store was burned, and where there was an inquest being held by the coroner and jury over the remains found at the store. The inquest was not closed that day, but adjourned to the next, and the prisoner was kept under guard. The inquest convened at about eight o'clock the next morning, and proceeded with the investigation, and during the time the investigation was going on, the guard (four men) who had the prisoner in charge put a rope with a slip-noose around his neck and carried him to the woods, about one fourth of a mile from where the inquest was being held, when they threw the other end of the rope which was around the neck of the prisoner over a limb, and told him, the prisoner, to tell what he knew about the crime with which he was charged. He said he knew nothing, when the guard

tightened on the rope, and then asked the prisoner if he would tell what he knew about the killing of Hammond and the burning of the store; but he again said that he knew nothing, when the rope was again tightened, and the prisoner then said if they would give him two minutes he would tell all that he knew about it. The guard told him to tell the truth and to stick to it; that he had to stick to what he then said; and that he had to stick to it in court, which the prisoner promised to do. There was also some evidence tending to show that there were threats made by the guard, all of whom were armed with Winchester rifles or double-barreled shotguns, that if the prisoner did not tell the truth, the whole truth, and nothing but the truth, and stick to it, he would be killed; that after the prisoner agreed to confess, the guard carried him back to where the inquisition was being held, and informed the jury, or the magistrate, who was acting as coroner, that the prisoner was ready to confess; that the prisoner looked like he had passed a sleepless night; that the jury took a recess for the purpose of allowing the prisoner time to reflect and to take some refreshments; that after partaking of water-melons as refreshments, the prisoner was taken before the jury, and then and there made his statement, confessing his complicity in the killing of Hammond and the burning of Fant's store; that there was great excitement among the large crowd of people who had assembled at the place at the time; that a gun had been fired by a party, who shot himself through his toe, and that there had been talk of lynching the perpetrators of the supposed murder; that in this first confession the prisoner stated that McCullough had killed Hammond, and that he and Bostock were present aiding and assisting McCullough. After this statement, the inquest was adjourned for the purpose of giving time to arrest Bostock and McCullough; that they were arrested, and the coroner's jury being assembled, the prisoner was required to repeat his statement in the presence of Bostock and McCullough, which he did repeat; that on the night of the second day of the proceedings, the defendant, with the other parties whom he had implicated in his confession, Bostock and McCullough, were taken to jail at Ocala, and that on the following day the prisoners were taken to Martel, about three and a half miles from Cotton Plant, where the coroner's inquest was held, for a preliminary hearing before H. H. Hudgens, a justice of the peace, and who had acted as coroner at the inquest; that before he

made his confession at Martel the prisoner was cautioned by Mr. Long that any statement he made would be used against him; and that he, the prisoner, was assured by Mr. Long and Mr. Harrison that he would be protected in any statement he might make; that the law and the citizens would protect him; that he, Harrison, relied upon his influence in the community to protect the prisoner, but he admitted on cross that he could not protect him; that the prisoner was not represented by counsel at either Cotton Plant or Martel; that two of the guards who had extorted the confession from the prisoner at Cotton Plant were present when he made his confession at Martel; that Hudgens, justice of the peace, who acted as coroner at Cotton Plant, and who held the preliminary examination at Martel, never at any time cautioned the prisoner that any confession or statement he might make would be used against him, nor did he in any manner inform the prisoner of his rights in the premises, or afford the prisoner any protection whatever, or offer to afford him such protection.

There was much more evidence in the case, but the foregoing is the substance of the whole, and it is not in any material point changed by any other part thereof; and it is sufficient, we think, to give a clear idea of the facts of the case.

At the trial of the cause, the state offered in evidence the several confessions made by the plaintiff in error, to the introduction of which plaintiff in error objected; the court admitted in evidence the confessions made at Martel; but excluded those made at Cotton Plant, to which the plaintiff in error duly excepted.

The following is the confession admitted in evidence, upon the evidence of H. W. Long, a witness for the state, and who had assisted in conducting the case against the prisoner at both the coroner's inquest and the preliminary examination, which evidence is corroborated by other witnesses: "The defendant, in substance, stated at Martel that after the difficulty between him and Hammond, which occurred at Cotton Plant, near Mr. Mann's store, that he left for his home, and stopped where two men by the name of McCullough and Bostock were drawing boards; that he communicated to them the difficulty he had had with Hammond. One of them, I think McCullough, stated to him that he had a grudge against Hammond, and they had better put him out of the way, giving as a reason, that in case Hammond was permitted to live, that he and his friends would take the life of Coffee; that they then

and there made up and agreed that they would meet at Coffee's house—these two men, McCullough and Bostock, would meet at Coffee's house—during that night, and that they would from there proceed to Fant's store and murder Hammond; that about one o'clock he, or one of them (my recollection is), whistled (I am not positive as to the precise hour), which he recognized as a signal for him to join them; that he did so; that one of them (I forget which, — McCullough or Bostock) had a quart bottle of kerosene oil, and the other a pistol, and that he, Coffee, had a pocket-knife; that on their way to the store he, Coffee, suggested that they must not shoot Hammond, there being houses in close proximity to the store where Hammond slept; that the firing of the pistol would arouse the inmates of the houses. They then agreed that the man having the kerosene oil was to saturate the front of the store with the oil, and apply fire to it by the use of matches; that the other two were to take their stand at or near the door entering Hammond's bedroom; that the fire was so applied; that Hammond did not wake until the roof of the front of the store was falling in. They heard him then get out of the bed, and he moved his trunk to the door, opened it, and in a leaning position was in the act of shoving the trunk out, when the man having the pistol in his hand struck; he had the muzzle of the pistol in his hand, and struck Hammond with the hammer of the pistol on the forehead. Hammond hollowed 'Oh Lord!' fell to the floor, arose retreating, falling as he went, and rising. As he entered the cotton-room, adjacent to his bedroom, he fell upon his face; that the party who had accosted him went in to where he was, and discovered that he was dead; that one of the parties then went into the store and got a match-box, I think, that was used as a money-drawer to deposit money in, brought out what money there was, amounting to a small amount, — five or six dollars, I think; I don't remember exactly the amount. They concluded they heard some person, and ran in a southeasterly direction, crossing the railroad east of the store several hundred yards, and went to a log where, on the way to the store, they had pulled off their shoes,—or some of them had. The proposal was then made to divide the money. The two that had not done the killing told the man that had to keep the money himself. They afterwards separated, and went to their respective houses. That is the substance that I

remember. While Coffee took no part in the matter, he was there for the purpose of aiding and abetting."

Upon cross this witness stated some additional minor details, which did not change the foregoing statements of the witness in any material point. Other witnesses testified to the confession, but none of them stated any fact materially differing from the facts as testified to by Mr. Long.

To show the circumstances under which the prisoner was induced to make the first confession, we give the evidence of James S. Mann, one of the guards, who, after detailing the arrest, says: "He was then put in an old house and guarded that night. On the second day he (the prisoner) was carried back to where the inquest was going on all day, about eight or nine o'clock. That was next morning. Nothing was done to him before he was carried back to the inquest. After I handed him over to the guard I saw him. I was around there with him. He was first in charge of one and then another. Gurky had him first. I don't know who I turned him over to first at that time. I was right there all the time. I was not there exactly all the time, — very near all the time. Question: Was the defendant there all the time? No, he was not. He was a quarter of a mile from the ground, — south of the ground, in the woods. I was with him all that time for one, and James Radcliffe Gurky and John Parker. I was armed. Yes, a rope was put around his neck; he was not pulled up to a tree; the rope was put over a limb, but it was not pulled up. He was told to tell the truth, and nothing but the truth, and that he had to stick to it. He was asked by one of the party, after he made the confession, would he stick to it in the court, and he said he would. The rope was tightened a very little. The rope was loosened on the defendant when he confessed. The defendant denied all knowledge of the crime before the rope was tightened. I think that he was told that that was the last hour, and that he must tell all that he knew about it. He said he knew nothing at all about it. No, he was not told he was given two and a half minutes to confess. He said himself that he would tell everything if we would give him two minutes. He was not asked whether George Bostock and Adam McCullough together with him did the thing. I think the rope was tightened on him twice. I could not tell you how tight the rope was pulled, — I didn't have hold of it; not very tight, I don't think. I am positive he was not lifted off the ground. I think he raised himself on his toes to keep the rope

from tightening on his neck. The first time the rope was tightened on him he said he would tell the truth, and we were not satisfied with what he told. He only brought in two other parties, and claimed to be out himself. A question was put to him how he knew about them, and the rope was tightened on him the second time, and he made a full confession. Question: How long a time elapsed after he was pulled up to the tree before coroner's inquest? Not long; about a half-hour. (We presume that the meaning of this is, How long after the confession before defendant was carried before the jury of inquest?)

The first two errors assigned may be considered together, as they raise but one and the same question, to wit: Did the court below err in admitting in evidence the confession made by plaintiff in error at Martel?

The Martel examination was a judicial examination; and it was the duty of the justice of the peace holding the same to caution the prisoner, to put him on his guard, and to inform him as to his rights in the premises: Heard's Criminal Law, 192, and cases cited; 3 Russell on Crimes, 9th ed., 378.

Before the confessions of a party charged with crime are admissible in evidence against him, it must be shown that such confession was freely and voluntarily made: *Simon v. State*, 5 Fla. 285; *Dixon v. State*, 13 Fla. 336; *Meizger v. State*, 18 Fla. 481; *Flanagin v. State*, 25 Ark. 92; *State v. Staley*, 14 Minn. 105; *Cady v. State*, 44 Miss. 332; *State v. Lowhorne*, 66 N. C. 638; *O'Brien v. People*, 48 Barb. 274; *Vaughn v. Commonwealth*, 17 Gratt. 576; *Price v. State*, 18 Ohio St. 418; *Mose v. State*, 36 Ala. 211; *Aaron v. State*, 37 Ala. 106; *Joe v. State*, 38 Ala. 422; *Dinah v. State*, 39 Ala. 359; *Miller v. State*, 40 Ala. 54; *Love v. State*, 22 Ark. 336; *People v. Jim Ti*, 32 Cal. 60; *Miller v. People*, 39 Ill. 457; *Austine v. People*, 51 Ill. 236; *State v. Ostrander*, 18 Iowa, 433; *Frank v. State*, 39 Miss. 705; *State v. Brockman*, 46 Mo. 566; *Frain v. State*, 40 Ga. 529; *Stutte v. Howard*, 17 N. H. 171; *People v. Phillips*, 42 N. Y. 200; *State v. Squires*, 48 N. H. 364; *Commonwealth v. Tuckerman*, 10 Gray, 173; *Commonwealth v. Whittemore*, 11 Gray, 201; *State v. Walker*, 34 Vt. 296; *State v. Carr*, 37 Vt. 191; *Thompson v. Commonwealth*, 20 Gratt. 124.

It is a rule of law that the confessions of parties charged with crime should be acted upon by courts and juries with great caution: 4 Greenl. Ev., sec. 200; Best on Evidence, 537; *Deathridge v. State*, 1 Sneed, 75; *People v. Johnson*, 41 Cal. 492;



*Simon v. State*, 5 Fla. 285; *Dixon v. State*, 13 Fla. 636; *Metsger v. State*, 18 Fla. 481; *People v. Ruloff*, 3 Park. Cr. 438.

The wisdom of this rule cannot be questioned, for the reason that notwithstanding the confessions of persons accused of crime have been held to be evidence of the very highest character, upon the theory that no man would acknowledge that he had committed a grave crime unless he was actually guilty; but experience teaches that this theory is a fallacy; for it is a fact that numbers of persons have confessed that they were guilty of the most heinous crimes, for which they suffered the most horrible punishments, and yet they were innocent.

In the sixteenth and seventeenth centuries, in enlightened England, men and women confessed that they were guilty of witchcraft,—communion with evil spirits,—and suffered at the stake therefor; and at this day, men, through fear of personal punishment, or through hope of averting such punishment, confess that they are guilty of crime, without the slightest foundation in truth for such confession; and for these reasons, we say that the theory that men will not confess to the commission of crimes of which they are innocent is a fallacy.

There is another rule of law, and it has its foundation in justice, and that is, that when a confession has, in the first place, been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown: *Simon v. State*, 5 Fla. 285; *Love v. State*, 22 Ark. 336; 2 East P. C. 658; Roscoe's Criminal Evidence, 40; *Peter v. State*, 4 Smedes & M. 37; *Joe v. State*, 38 Ala. 422; *Dinah v. State*, 39 Ala. 359; *Ward v. State*, 50 Ala. 120; *Redd v. State*, 69 Ala. 255; *People v. Jim Ti*, 32 Cal. 60; *People v. Johnson*, 41 Cal. 452; *Austine v. People*, 51 Ill. 236; *Commonwealth v. Cullen*, 111 Mass. 435; *State v. Brockman* 46 Mo. 566; *State v. Jones*, 54 Mo. 478; *State v. Howard*, 17 N. H. 171; *Deathridge v. State*, 1 Sneed, 75; *Barnes v. State*, 36 Tex. 356; *Thompson v. Commonwealth*, 20 Gratt. 724; Best on Evidence, 537; Heard's Criminal Law, 189, and cases cited; 2 Russell on Crimes, 832; 2 Starkey on Evidence, 49; Wharton's Criminal Evidence, 677.

And now, applying the evidence in the case to the principles of law laid down *supra*, was the confession made by the plaintiff in error at Martel, under the circumstances it was made, proper legal evidence to go to the jury? If so, the court below committed no error in admitting said Martel con-

fession. But on the other hand, if the Martel confession was not made under such circumstances as to most clearly show (and it was incumbent on the state to show that fact) that said confession was voluntarily made, uninfluenced by the circumstances that induced the prisoner to make his former confession, then said confession was not legal evidence, and the court erred in admitting it. Does the evidence clearly show that the Martel confession was freely and voluntarily made? Do the facts and circumstances of the case show this fact? But the day before, the prisoner, who was accused of a most atrocious crime, was taken, by the guard under whose protection he should have been, from the very presence of the officers of the law, including the justice of peace, carried to the woods near by with a rope around his neck, and then swung up to a limb, and before the muzzles of shotguns and Winchester rifles, and being told it was his last hour, was forced to confess that he was guilty of the crime with which he was charged; forced to promise that he would stick to the confession he made, and forced to promise that he would stick to what he then confessed, in court. The prisoner was then carried before the coroner's jury, presided over by Hudgens, a justice of the peace, and then, with all the excitement and threats of lynching by which he was surrounded, and in the presence of the guards to whom he had confessed, and whom he had promised to stick to his first confession in court, without counsel, and without a word of caution from the justice of the peace, without being by said justice informed as to any rights he had, the prisoner again confessed, and in this confession he implicated Bostock and McCullough, who were brought before the jury, and the prisoner was then, as Mr. Long swears, required to make the same statement in the presence of Bostock and McCullough, and he again confessed. Carried the following day before the same justice, at Martel, for preliminary examination, the prisoner again confessed. But under what circumstances did he confess? Without counsel, in the presence of two of the guard who had in the first instance extorted the confession from him, without a word of warning or caution from the justice, and without any assurances of protection by the justice in case he confessed, or declined to confess, was this Martel confession made.

Now, it is true that both Mr. Long and Mr. Harrison, in their evidence, say that they cautioned the prisoner that anything he might say would be used against him, and that they

promised to protect him. But who were they to thus caution the prisoner and to promise him protection, and in the light of what had actually occurred to the prisoner on the previous day, in the very presence of these gentlemen, what confidence could the prisoner have in such promises, though ever so honestly made? Mr. Long was acting as prosecuting officer for the state at the time, and endeavoring to fix the crime on the prisoner, and Mr. Harrison held no official position whatever to which the prisoner could hope to look for protection. Take all the evidence in regard to said confession into consideration, and we are not satisfied that the same influences which induced the first confession did not operate upon and control the prisoner in his last, or Martel, confession.

It is contended that the court below, in the exercise of its sound discretion, admitted the confession, and that this court is precluded from questioning such discretion. As a rule, the discretion given to the circuit courts is conclusive, but there are exceptions to this rule; and when it is shown that the circuit court has transcended its discretion, and that a wrong may have been done thereby, this court will control such discretion: *Blige v. State*, 20 Fla. 742.

There is another part of the evidence in this case, and the charge of the court in reference thereto, that strikes us as being very peculiar; that is, that the plaintiff in error confessed that he, Bostock, and McCullough killed Hammond, whereas he, Paul Barco, and Holmes Jacobs were together indicted for said offense; and at the trial, the confession made by the plaintiff in error, that he, Bostock, and McCullough were the guilty parties, was admitted to show that he, with Barco and Jacobs, had committed the offense. Before a man is put on trial he has the right to be put on notice as to the crime with which he is charged. But in this instance, what was the notice to the accused? Was it that he, Jacobs, and Barco killed Hammond, or that he, Bostock, and McCullough killed him?

After the repeated confessions of the accused, the state seemed to have adopted the theory that Coffee, Bostock, and McCullough were the parties who killed Hammond, and they were committed on the charge; but before the trial this theory was abandoned, and Coffee, Jacobs, and Barco were indicted for the offense. During the trial the second theory adopted by the state was abandoned, and the first again taken up, and evidence — Coffee's confession — was introduced in support of this, the first theory. Upon this state of the case, the court

charged the jury, "that in cases of capital felonies, all parties who are present, aiding and abetting at the time of the commission of the felony, are principals, and upon the trial of one of the parties accused, it is not necessary for his conviction that it should be shown that the party on trial himself inflicted the fatal wound, but it is sufficient if it be proved that he was present at the time of the commission of the felony, aiding and abetting." This is a sound legal proposition, but how does it apply to the case at bar? If the plaintiff in error had been indicted with Bostock and McCullough, and his confession had been legal evidence, then there would have been something to base such a charge upon; but under the indictment upon which he was tried, there is not a particle of evidence to connect either Barco or Jacobs with the death of Hammond. Under this charge, who are the parties supposed to be present, aiding and abetting the murder of Hammond, and who was the party aided and abetted? Under the indictment, Bostock and McCullough could not have been aiding and abetting Coffee, nor could Coffee have been present aiding and abetting Bostock and McCullough, or either of them, because the indictment charges no such offense. And under this state of facts, what charge was the plaintiff in error called upon to meet? If he and Bostock and McCullough killed Hammond, that was an offense, but if he and Barco and Jacobs killed Hammond, that was another and a distinct offense; or in other words, it was an offense committed by other parties. When a man is put on trial, he is entitled to a plain statement of the offense with which he is charged, and at his trial the evidence is to be confined to the offense with which he is charged; but in the case at bar, the evidence was not confined to the charge; it was irrelevant, and it was improperly admitted, and the charge of the court, under the circumstances, was improper.

The third assignment of error—that is, that the verdict of the jury was against the evidence—is, we think, well taken, because, under the view we have taken of the case, there was not legal evidence before the jury to sustain a conviction.

The judgment of the court below is reversed, and the cause is remanded, with directions for further proceedings not inconsistent with this opinion.

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CRIMINAL LAW — EVIDENCE — ADMISSIBILITY OF CONFESSIONS. — The confession of an accused, to be admissible in evidence, must be a voluntary statement by him, taken before an examining court, in accordance with law,

or made voluntarily after being cautioned that it would be used against him: *Crowder v. State*, 28 Tex. App. 51; 19 Am. St. Rep. 811, and note; *People v. Mondon*, 103 N. Y. 211; 57 Am. Rep. 709; *Nolen v. State*, 14 Tex. App. 474; 46 Am. Rep. 247, and note; *Walker v. State*, 28 Tex. App. 112; *Mitchell v. State*, 79 Ga. 730; *Covington v. State*, 79 Ga. 687; *State v. Moorman*, 27 S. C. 22; *Coleman v. State*, 87 Ala. 14.

**CRIMINAL LAW—EVIDENCE—WEIGHT OF CONFESSIONS.**—It is within the exclusive province of the jury to determine the weight of voluntary confessions admitted in evidence: *McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25; *Ellis v. State*, 65 Miss. 44; 7 Am. St. Rep. 634, and note.

## EL MODELLO CIGAR MANUFACTURING COMPANY v. GATO.

[25 FLORIDA, 383.]

**TRADE-MARKS—IN WHAT MAY BE ACQUIRED.**—A person may acquire the right of a trade-mark in his own name or in the name of any person, but he cannot acquire it in the use of his own name, to the exclusion of the right of another person having the same name, and whose place of business is in the same place.

**TRADE-MARKS—INFRINGEMENT OF.**—When one uses his own name to identify and distinguish the origin and ownership of his goods, manufactured at a particular place, no other person by the same name will be permitted to use his name on his own goods under such circumstances as are calculated and designed to enable him to represent his goods as and for the goods of such other, so as to injure the trade and business of the latter.

**TRADE-MARKS—IN WHAT MAY BE ACQUIRED.**—One may establish his right to a trade-mark in the name of a place, city, or town; and when he manufactures his goods at a particular place, and uses the name of that place, in combination with other words, as a trade-mark, to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place upon goods manufactured by him at another or different place.

**PRACTICE—DEMURRER TO BILL** for want of equity, if general, will be overruled, if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer.

**TRADE-MARKS—INFRINGEMENT—PRESUMPTION.**—When a trade-mark is calculated to deceive, even if no one has been actually deceived, an intention to deceive will be presumed; and though there may be no intention to deceive, one will not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them will injure the latter. In such case an injunction will be granted.

**TRADE-MARKS—INJUNCTION—LACHES.**—Lapse of time will not deprive the owner of a trade-mark of the right to an injunction against an infringer, if he has exercised reasonable diligence in asserting his rights; nor will mere acquiescence in the wrongful use of his name estop him from asserting his rights, unless he has notice, during such acquiescence, of the facts rendering the use of his name wrongful.

**TRADE-MARKS — INJUNCTION — LACHES OF COMPLAINANT WILL NOT AVAIL** as a defense in a proceeding to restrain the use of a trade-mark, when the defendant adopted the mark with a fraudulent intent.

**TRADE-MARKS — MEASURE OF DAMAGES FOR INFRINGEMENT.** — One whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious article, and also damages resulting from such violation. He is entitled to nominal damages for the violation of his trade-mark, without proof of actual damages, or that the spurious articles were inferior to his own.

*Randall, Walkers, and Foster*, for the appellants.

*G. B. Patterson and H. Bisbee*, for the appellees.

MITCHELL, J. The first question to be decided is, Did the court below err in overruling the first ground of the demurrer to the bill?

In discussing the demurrer to the bill, counsel for appellants insist that defendants had the right to use the name of G. H. Gato, and that Gato had the right to manufacture cigars, and that G. H. Gato had the right to use his own name in announcing the origin of his cigars, provided no fraud was practiced by him in so doing, and cite the following authorities as sustaining their position: *Partridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281, and note; *Clark v. Clark*, 25 Barb. 76; *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Faber v. Faber*, 49 Barb. 357; *Wolfe v. Burks*, 7 Lans. 151; *Meneely v. Meneely*, 62 N. Y. 427; 20 Am. Rep. 489; *Mansam v. Thorley Cattle Food Co.*, 36 L. T., N. S., 427; *Ainsworth v. Walmsley*, 35 L. J. Ch. 362; *Hardy v. Cutter*, 3 U. S. Patent Gazette, 468; *Carmichel v. Latimer*, 11 R. I. 395; 23 Am. Rep. 481; *Decker v. Decker*, 52 How. Pr. 218; *Gilman v. Hunnewell*, 122 Mass. 139.

Now, we admit the soundness of the legal proposition as laid down *supra*, but after the complainant, whose factory was located at Key West, had adopted his own name, in combination with the words "Key West," "La Estrella," and "Bouquet," and certain brands, labels, and pictures, as his trade-marks, the defendants did not afterwards have the right to adopt the name of G. H. Gato, in combination with the words "Estrella," "Bouquet," and "Key West," and certain brands, labels, and pictures, in combination with the name of G. H. Gato, as their trade-marks, when the words, etc., so adopted by them so closely resembled the trade-marks so adopted by the complainant as to enable them to palm off upon and induce an ordinary purchaser to buy their cigars for those of the complainant, whereby the defendants

might be profited and the complainant might be injured: *Robertson v. Barry*, American Trade-mark Cases, 153; *Humphries Specific Homœopathic Medicine Co. v. Wenz*, American Trade-mark Cases, 711; *Liggett and Meyer Tobacco Co. v. Hynes*, American Trade-mark Cases, 898; *Glen Cove Mfg. Co. v. Ludeman*, American Trade-mark Cases, 957; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

It is now well established that a man may acquire the right of a trade-mark in his own name, or in the name of any person, but a man cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place; yet it is well settled in the law of trade-marks that when one person uses his own name to identify and distinguish the origin and ownership of his goods which are manufactured at a particular place, no other person by the same name will be permitted to use his name on his own goods, if under such circumstances as are calculated and designed to injure the trade and business of another. In other words, one man will not be allowed, though his name be the same as that of another person or manufacturer, to represent his goods as and for the goods of another: *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 33 Am. Rep. 337, note 1.

A man may establish his right to a trade-mark in the name of a place, city, or town, and it is well established that when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place: *Canal Company v. Clark*, 13 Wall. 325; *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *Glen and Hall Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Lawrence v. Hamm*, 1 Fed. Rep. 24; *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 33 Am. Rep. 337, note 1. Under these decisions it will be seen that the defendants clearly had no right to use the name of the place, Key West, or the name of G. H. Gato, either alone or in combination with the other words, as alleged in the bill to have been used by them.

The defendants, by their answer, aver that they did not intend to injure the complainant by any contrivance, etc.

But do not the facts and circumstances of the case contradict such averments of the defendants? If they did not intend to injure the complainant, why did they aver in their answer that the atmosphere of Key West was not more favorable for the manufacture and preservation of cigars than at points north of that place, when they had branded their boxes "Key West," and had printed on their letter and bill heads the words "Key West" and "Gato's Fine Key West Cigars," thereby inducing the public to believe that their cigars were manufactured at Key West, when in fact they were manufactured at Jacksonville? And why did they use the name of the junior member of their firm in combination with the words "Key West," "La Estrella," and "Bouquet," the only difference between the name of the said junior member of said firm being the initial letter of his christian name, "G," the initial letter of complainant's christian name being "E"? and why did defendants so print the name of the junior member of their firm upon their cigar-boxes that it would as readily be taken for the name of the complainant, "E. H. Gato," as for that of said junior member, "G. H. Gato"?

There can, we think, be but one answer to these questions, and that is, that the defendants, by their said actions, intended to deceive the public by palming off their cigars as and for those of the complainant, as alleged in the bill.

A general demurrer to a bill, as for want of equity, will be overruled if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer: *Thompson v. Maxwell*, 16 Fla. 775.

The demurrer to the bill in the case at bar is general, and the bill shows on its face that the complainant is entitled to the equitable relief prayed for, wherefore the order for the chancellor overruling the first ground of the demurrer was not erroneous.

In the second place, did the court below err in granting the temporary injunction?

We have before us as exhibits (sent up with the record of the case) empty cigar-boxes of the complainant's "La Estrella" and "Bouquet" brand of cigars, and one of the defendants' "Bouquet" brand, and by placing the two Bouquet boxes side by side, the dissimilarity between the two is apparent, and there is sufficient difference between them, we



think, to enable an expert in such matters to distinguish the brand of the complainant from that of the defendants, without placing the boxes side by side; but the general appearance of the two boxes, and the stamps, brands, pictures, labels, letters thereon and therein, are so very similar in size, shape, and color that they are calculated to mislead an ordinary purchaser, and whenever this is the case, a court of equity will grant a decree restraining a defendant from so simulating the trade-marks of the complainant: *Robertson v. Berry*, American Trade-mark Cases, 153; *Humphries Specific Homœopathic Medicine Co. v. Wenz*, American Trade-mark Cases, 711; *Liggett and Meyer Tobacco Co. v. Hynes*, American Trade-mark Cases, 898; *Glen Cove Mfg. Co. v. Ludeman*, American Trade-mark Cases, 957; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286; *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

When a trade-mark is calculated to mislead, even if no one has been actually deceived, an intention to deceive will be presumed: *Carie's Appeal*, American Trade-mark Cases, 116.

And although a man may not intend to injure another, yet he will not be allowed to adopt the marks by which the goods of such other person are designated, if the effect of adopting them would injure such other person: *Sheppard & Co. v. Stuart and Peterson*, American Trade-mark Cases, 193; *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589; *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642; *Liggett and Meyer Tobacco Co. v. Hynes*, 20 Fed. Rep. 883.

We have not been furnished with any of defendants' boxes of the "Estella" brand; but the bill alleges that this brand of defendants so closely resembles the "Estrella" (star) brand of complainant that it is calculated to mislead the public into believing the brand of the defendant to be that of the complainant. The demurrer to the bill admits these allegations of the bill, and the defendants virtually admit the truth of the allegations in their answer. They, it is true, deny, in a general way, the allegations of the bill in regard to the said brand so closely simulating complainant's brand, but failed utterly to show wherein their brand does not resemble the complainant's. They admit the manufacture of the "Estella" brand of cigars at Jacksonville, but say that the word "Estella" is not "Estrella" as alleged in the bill. Is this a denial of the positive allegations of the bill as to the resemblance between the said two brands? Certainly

not. Then why did not the defendants deny the allegations of the bill if they were not true? They admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant. The omitting of the letter "r," as aforesaid, was but an artifice resorted to by the defendants under the belief that it would not be detected; but if detected, it might protect them in a suit for damages by the complainant against the defendants for so pirating his trade-mark. No other conclusion would be consistent with the facts of the case.

The affidavits of Bishop & Co. and others filed in the case tend to show that the defendants have palmed off and sold their said cigars as and for those of the complainant, and that the agents of the complainant have had to publish notices in newspapers cautioning the public against the deception thus practiced by the defendants. This the defendants have attempted to contradict by filing counter-affidavits stating that the affiants knew of no such efforts, either on the part of the defendants or their agents, to palm off or use their cigars as, of, and for those of the complainant. This is mere negative evidence, and proves nothing. There was no error in granting the temporary injunction.

This disposes of the error assigned by appellants; but counsel, in their argument, further contend that the complainant has been guilty of such laches that he is not entitled to the relief he prays for, and cites 6 *Wait's Actions and Defenses*, 42, 43; *Beard v. Turner*, 13 L. T., N. S., 747.

The rule in England in trade-mark cases is more stringent than in this country, and a lack of diligence there in suing deprives complainant in equity of the right to an injunction or an account. But our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrong-doer to account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant: *Sawyer v. Kellogg*, *American Trade-mark Cases*, 564.

Nor will the acquiescence of any person in the wrongful use of his name estop him from asserting his rights in equity, unless he has notice during such acquiescence of the facts rendering the use of his name wrongful: *Horton Mfg. Co., James*

*town, N. Y., v. Horton Mfg. Co., Ft. Wayne, Ind., American Trade-mark Cases, 857.*

And the laches of the complainant will not avail as a defense in a proceeding to restrain the use of a trade-name, when the defendant adopted the name with a fraudulent intent: *Sanders v. Jacob, American Trade-mark Cases, 1048.*

The complainant was in no such laches as would deprive him of his rights in the premises.

The only remaining question to be considered is, Did the chancellor err in sustaining the second ground of defendants' demurrer to the bill?

This court held in *Doggett v. Hart, 5 Fla. 230, 58 Am. Dec. 464*, that "in cases of accounts, of agency, of apportionment, of general average, of contribution, of waste, and of partnership, when chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters of which it has only incidental cognizance, in order to avoid a multiplicity of suits."

"Another rule," says Mr. Story (1 Story's Eq. Jur., sec. 64 k), "respects the exercise of jurisdiction, when the title is at law, and the party comes into equity for a discovery, and for a relief as consequent on that discovery. In many cases it has been held that, where a party has a just title to come into equity for a discovery, and obtains it, the court will go on, and give him the proper relief, and not turn him round to the expenses and inconvenience of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation, that 'the court, having acquired cognizance of the suit for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake.'"

In the case at bar, the bill prays for discovery, an accounting of profits, injunction, damages, and general relief; and the only ground of objection to the bill, raised by the second ground of defendants' demurrer, is, that the bill prays damages.

That a man whose trade-marks have been infringed upon, as in this case, is entitled to compensation for the infringement is unquestionable, and it strikes us that it makes no difference whether the compensation to which the complainant is entitled is called profits or damages. What is an

accounting but the method by which to ascertain the complainant's damages, or compensation for the wrong and injury done him by the defendants?

That the complainant is entitled to damages, see *Hostetter v. Vonwinkle*, 1 Dill. 329; *Pitt v. Hall*, 2 Blatchf. 229; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Graham v. Plate*, 40 Cal. 593; 6 Am. Rep. 639; *Marsh v. Billings*, 7 Cush. 322; 54 Am. Dec. 723; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Blackwell v. Wright*, 73 N. C. 310.

A party whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious article, and also damages resulting from such violation: *Graham v. Plate*, 40 Cal. 593; 6 Am. Rep. 639; *Peltz v. Eichele*, 62 Mo. 171; *Marsh v. Billings*, 7 Cush. 322; 54 Am. Dec. 723; *Atlantic Milling Co. v. Robinson*, American Trade-mark Cases, 904; *Hostetter v. Vonwinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229.

The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damages, and although the defendant's articles are not inferior in quality to his own: *Blotfield v. Payne*, 4 Barn. & Adol. 410; 1 Nev. & M. 335; *Thomson v. Winchester*, 19 Pick. 214; 31 Am. Dec. 185; *Rodgers v. Nowill*, 5 Com. B. 109; *Conran v. Joseph Uhrig Brewing Co.*, American Trade-mark Cases, 316.

The decree of the court below granting injunction is affirmed, but the order sustaining defendants' demurrer to that part of the bill that claims damages in excess of profits realized is reversed, and the cause remanded for further proceedings consistent with this opinion, the appellant, El Modelle Cigar Manufacturing Company, to pay all costs of the suit.

Appellants filed a bill for a rehearing, which was denied.

**MAXWELL, J.** Appellants are not satisfied with the decision in this case, and they now come with application for a rehearing, based on mistakes of the court in the opinion rendered.

The first mistake complained of is in relation to a statement of the court respecting allegations of appellants in regard to climatic and atmospheric conditions in Key West, as adapted to the manufacture and preservation of cigars. The court asked in argument, why did appellants "aver in the answer that the atmosphere in Key West was not more favor-

able for the manufacture and preservation of cigars than at points north of that place," etc. So far as we can see, this is but hypercritical, in that the word "aver" was used instead of the word "deny." Whether it was an averment or denial made no difference as to the question then under discussion, of intention to injure complainant by the use of simulative words and brands.

The next ground for rehearing is, that "there is no allegation in the bill or answer, nor is there any proof, that G. H. Gato was the junior member of the firm of the El Modelo Cigar Manufacturing Company, yet the court, in its opinion, asked why did they use the name of the junior member of the firm in combination with the words 'Key West,' 'La Estella,' and 'Bouquet.'" With all due respect to counsel, this seems simply frivolous. G. H. Gato was spoken of as the junior member of the firm because in the list of four partners his name appeared last. But whether he was a junior or other member did not affect the question involved in the use of his name, the impressive fact being, that his name was used, instead of any other of the four, or of the firm name, to direct attention to the brand of cigars.

The third ground for rehearing is, that there was a mistake of the court in reference to the La Estella brand of cigars, in saying that the defendants "admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant." The paragraph of the opinion in which this sentence occurs, taken altogether, is such as to render the sentence susceptible of reference to the admission of defendants under their demurrer to the bill. In this view the statement is correct. But without regard to that, and even if the mistake is a substantive one, it cannot affect the conclusion of the court, for there is still the "Bouquet" brand not touched by this mistake, which furnishes sufficient ground for that conclusion.

A rehearing is denied.

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**TRADE-MARKS — IN WHAT MAY BE ACQUIRED.** — Every person has the right to use his own name in the prosecution of his business: *Caswell v. Howard*, 121 N. Y. 484; 18 Am. St. Rep. 833, and note.

**TRADE-MARKS — INFRINGEMENT — FRAUD.** — A trade-mark imitated in a way calculated to deceive, and which does deceive, ordinarily prudent persons, entitles them, and the one whose label is imitated, to protection: *Alf v. Radam*, 77 Tex. 580; 19 Am. St. Rep. 792, and note. Where one uses the

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trade-mark of another, the presumption is that he intends to deceive, and that he will probably succeed in his purpose, and injunction will issue to restrain such wrongful use: *Keller v. Goodrich Co.*, 117 Ind. 556; 10 Am. St. Rep. 88, and note; *Kenny v. Gillett*, 70 Md. 574; *Laughman's Appeal*, 128 Pa. St. 1; *Heins v. Brueckman*, 134 Pa. St. 495; *Small v. Sanders*, 118 Ind. 105.

**TRADE-MARKS — LACHES.** — Laches in the prosecution of a claim against one who fraudulently uses the trade-mark of another may not, under the circumstances, preclude the relief sought: *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604.

**TRADE-MARKS — DAMAGES.** — Where one's right of property in a trade-mark has been violated, he may elect to claim damages or require the wrong-doer to account for profits: *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604, and note.

## TOWN OF KISSIMMEE CITY v. DROUGHT.

[26 FLORIDA, 1.]

**TAXATION — ASSESSMENT OF CITY LOTS IN BULK.** — Town lots, though in the same block and contiguous and belonging to the same person, should be separately assessed; but when the owner lists and values such lots in bulk for the purpose of assessment, this will be deemed a consent, and will estop him from complaining that the assessor did the same in making the assessment. An assessment so made will not be set aside.

*E. D. Beggs*, for the appellant.

*Foster and Gunby*, for the appellees.

**MAXWELL, J.** By agreement between counsel in these three cases, in connection with the case of *Town of Kissimmee City v. William Cannon*, just decided, it is understood that the decision in the latter case shall control in these. The complaint and the issues in all the cases are the same, and under the agreement, the questions of law involved in that case must be ruled in the same way in these. But there is some difference in the state of facts as to the assessment of the property of the parties, which will make a material difference in the result. The point on which this difference arises relates to the listing and valuation of property. In the Cannon case, his property was not listed by himself, but by the assessor. In the other cases, each of the parties did list their property, and affix valuations thereto; and in this listing, compared with that of the assessor, it appears that he adopted theirs just as given in by them, and that he valued the property in the same bodies or parcels that they did, though affixing valuations different from those affixed by them.

We find that in this state of facts, the doctrine is, that a party whose method of valuation is followed should not be heard to complain against this. Blackwell says: "Town lots, though in the same block and contiguous and belonging to the same person, must be separately assessed, unless where the owner consents (as where he himself lists them as one tract)." *State v. Baker*, 49 Tex. 763, is to the same effect. In that case it was held that the lien given by the constitution of Texas, on property assessed for taxes, "is a charge merely upon each separate tract for the tax assessed against it"; and the state failed to recover a tax assessed on several lots in Galveston, because they were assessed in bulk as of a gross value, it not appearing whether the lots constituted the whole or a part of the block, "and had been listed by the owners as one tract or parcel of land." But the court said: "We are not to be understood, however, by anything which we now or have heretofore said, as either holding or intimating that either lots or blocks, in a town or city, or originally distinct and separate surveys or grants in the country, if listed and assessed by the owner, or with his knowledge and approbation, as a single tract or parcel of land, may not be subject to a lien for the aggregate tax thus assessed."

It would seem to be reasonable, that a party who has listed and valued in bulk his contiguous lots should be estopped from complaining that the assessor did the same. Suppose the assessor adopts the list and also the valuation of the owner; surely he ought not to be permitted to complain afterwards that the lots were not valued separately. The fact that he valued the property at different figures from those of the owner cannot affect the consent that he should value it in bulk. The assessor is not bound by the owner's valuation, and if the valuation of the former is excessive, redress is to be obtained in the manner provided by the statute.

Our conclusion is, that the assessment in each of these cases should stand, and that the several judgments be reversed.

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**TAXATION — ASSESSMENT — TOWN LOTS.** — Town lots must be separately listed and valued for purposes of assessment: *People v. Clinic*, 70 Cal. 504. An assessment of several town lots together in one parcel or tract is void, if the owner did not return them to the assessor as a whole, and did not refuse to make a return: *Ondwalader v. Nash*, 73 Cal. 43.

## EX PARTE HARRIS.

[25 FLORIDA, 77.]

**JUDGE. — INTEREST WHICH DISQUALIFIES** a judge to sit in a case under the Florida statute is a property interest in the action or its result, in contradistinction to an interest of feeling, or sympathy, or bias that would disqualify a juror.

**JUDGE. — AFFINITY WHICH DISQUALIFIES** a judge to sit in a case is the arising from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. There is no affinity between the kinsmen of the wife and those of the husband, and *vice versa*. Hence the husband's brother and the wife's sister have no affinity, and the same is true of the husband's brother and the wife's brother.

**JUDGE — FACTS WHICH DO NOT DISQUALIFY.** — The facts that a judge has boarded with his sister-in-law, who has been a frequent visitor at his home, sometimes staying there several days, and that the judge has been and is a great admirer and friend of a brother of such sister-in-law, and regards him as scrupulously honest, will not disqualify such judge from presiding at the trial of such brother for a criminal offense.

**BAIL — JUDGE — DISQUALIFICATION.** — Where a person accused of a bailable offense is taken before the court on an application for bail, and the judge refuses to act on the ground that he is disqualified, the appellate court will grant bail conditioned for the appearance of the accused for trial, upon a showing on *habeas corpus* that such judge is not disqualified to act in the case.

*Frank W. Pope and O. J. H. Summers, for the petitioner.*

*William B. Lamar, attorney-general, for the state.*

**RANEY, C. J.** The petitioner was arrested on a charge of robbery, and an information was filed against him in the criminal court of record of Duval County, and he was brought into that court for arraignment, whereupon the judge, the Hon. Loton M. Jones, refused to take any action in the cause, either to try him or to admit him to bail, although the petitioner announced his willingness and readiness to be tried, and offered bail with good and sufficient sureties. The reasons given by the judge for his course are, that he is the brother of the husband of a sister of petitioner, and is therefore disqualified to take any action in the cause; and further, he has boarded with his said sister-in-law, and she is and has been a daily visitor to his house, remaining there sometimes for days, and petitioner has also been a visitor to his house, and he, the judge, has always been a great admirer and friend of the petitioner, and has always regarded him as scrupulously honest; and these considerations lead him to fear that he might not be able to do the state justice.



Being in the custody of the sheriff on capias issued upon the information, under the above circumstances, Harris applied to one of the justices of this court for a writ of *habeas corpus*, which he issued, making it returnable before the court, and the sheriff has made a return in keeping with the above facts stated in the petition.

The petitioner asks to be discharged or admitted to bail.

The act of December 4, 1862, provides that "no judge of any court, or justice of the peace, shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried." It also makes it the duty of the judge or justice so incompetent to retire of his own motion without waiting for an application to that effect, and declares void all judgments, decrees, or orders made by a justice so disqualified: *McClellan's Digest*, p. 337, secs. 28, 29.

Judge Jones is not a party to this proceeding, nor is it the proper remedy for obtaining an adjudication between the state and him, or the prisoner and the judge, upon the question of his qualification in the premises or power to try the petitioner, and directing him to proceed in the cause as it is his duty to do if he is not disqualified: *State ex rel. v. Walker*, 25 Fla. 561. Still, it is urged on behalf of petitioner that the judge is disqualified, and for this reason he should be discharged or bailed, as under the circumstances his detention will amount to indefinite imprisonment. If he is disqualified to hear the cause, and such disqualification is ground for the petitioner's discharge, he should be given his liberty; so without meaning to conclude Judge Jones upon the question in any direct proceeding against him, but merely as an answer to petitioner's claim, we must give our views on the subject.

The interest that disqualifies a judge under the statute is a property interest in the action, or its result, in contradiction to an interest of feeling, or sympathy, or bias that would disqualify a juror: *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190; *Ochs v. Sheldon*, 12 Fla. 138. There is, of course, no consanguinity between Harris and Judge Jones. Is there any affinity? Not according to any law we can find on the subject. Affinity is the tie arising from marriage, betwixt the husband and the blood relations of the wife, and betwixt the wife and the blood relations of the husband; but there is no

affinity betwixt the kinsmen of the wife and those of the husband, or *vice versa*; thus, say the books, the husband's brother and the wife's sister have no affinity. The same must be true of the husband's brother and the wife's brother: See title "Affinity" in the law dictionaries of Tomlin, Bouvier, Abbott, Rapalje and Lawrence. There is no affinity between the blood relatives of the husband and blood relatives of the wife: *Paddock v. Wells*, 2 Barb. Ch. 331; *Carman v. Newell*, 1 Denio, 25; *Spear v. Robinson*, 29 Me. 531; *Waterhouse v. Martin*, 4 Peck, 378. These authorities and those cited in them show beyond question that there is no affinity between Judge Jones and the prisoner. Moreover, in view of the doctrine in the case of *Leefe*, 2 Barb. Ch. 39, by Chancellor Walworth, citing *Mooers v. White*, 6 John. Ch. 360, by Chancellor Kent, it is questionable whether the statute operates as to affinity in a case like this, where the constitution has created a court, and made no provision for a trial by another judge or tribunal. The other circumstances upon which the judge bases his fear that he will not be able to do justice to the state are, as indicated above, not such interest as disqualifies him, nor is the presence of the apprehension any good evidence that he will not be careful or able to do justice.

The offense is bailable under our constitution and laws, and the prisoner should not, under the circumstances, be denied the right of bail, particularly as no steps have been taken by the state to test the correctness of Judge Jones's position. The proper order will, if it shall be necessary, be made, on application of counsel for petitioner, for inquiry into the circumstances of the alleged offense with a view to fixing the amount of the bail, which will be conditioned in the form usual and proper in such cases, for his appearance before the criminal court of record of Duval County, at the time or times to be specified under our direction in the bail piece.

It will be ordered accordingly.

**JUDGES, DISQUALIFICATIONS OF. — Relationship to a Party or Attorney. —**

A judge is not disqualified from sitting in a case for the reason that his wife is a cousin of one of the parties: *Blalock v. Waldrup*, 84 Ga. 145; 20 Am. St. Rep. 350, and note; nor because his brother is the attorney for one of the litigants: *Patrick v. Crowe*, 15 Col. 543; but he is disqualified when he himself is a nephew or cousin of one of the parties: *Horton v. Howard*, 79 Mich. 642. Under the statutes of Vermont, a deposition cannot be excluded merely because the party offering it is a second cousin of the magistrate before whom it was taken: *Reed v. Newcomb*, 62 Vt. 78.

*Interest or Bias.* — A judge is disqualified from trying a case in the result of which he may be interested as a party: *Limerick v. Murlatt*, 43 Kan. 318; but he is not disqualified because he was an unsuccessful bidder for the property about which there is controversy: *Patrick v. Crowe*, 15 Col. 543. See *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190.

*Previous Connection with the Litigation.* — That an attorney was defendant's counsel in a criminal case does not disqualify him from trying a case arising from the forfeiture by the accused of his bail bond: *Hobbs v. Campbell*, 79 Tex. 360. The defendant's father and step-mother having been killed at the same time, and defendant being on trial for the murder of his father, the trial judge is not disqualified by reason of the fact that before he became judge he was consulted by a brother of the step-mother as to the distribution of the estate: *Woolfolk v. State*, 85 Ga. 69.

*Age.* — In New York, a judge is disqualified to serve as a judge after the termination of the year during which he shall arrive at the age of seventy: *People v. Wemple*, 115 N. Y. 302.

## SAVANNAH, FLORIDA, AND WESTERN RAILWAY COMPANY v. HARRIS.

[26 FLORIDA, 148.]

**COMMON CARRIERS — LIABILITY OF CONNECTING LINES.** — A connecting carrier is bound only, in the absence of special contract, to safely carry over its own line and to safely deliver to the next carrier.

**COMMON CARRIERS — ORDER AND BURDEN OF PROOF IN CASE OF LOSS.** — In an action against a railroad company to recover for goods lost by it as a common carrier, the burden of proof is first on the plaintiff to show delivery and acceptance of the goods to be carried, and secondly, the loss and the value thereof. The burden is then shifted on the carrier to disprove these facts by a preponderance of evidence, or that the loss was occasioned by the act of God or the public enemy, or that the goods contained, in their nature, elements of destruction occasioning their loss.

**COMMON CARRIERS — CONNECTING LINES — LIABILITY OF LAST OR INTERMEDIATE CARRIER.** — Where goods transported by connecting carriers are lost or injured, and the last carrier is sued therefor, it will be held liable, in the absence of proof that the loss or injury occurred on some preceding line, on the presumption that the goods were delivered to it in the same good condition in which they were delivered to the first carrier.

*Fleming and Daniel*, for the appellant."

*A. W. Cockrell and Son* for the appellee.

**MAXWELL, J.** The action is by appellee against appellant, for damages occasioned by the loss of goods and injury to goods while being transported from Charlotte, New York, to Buffalo Bluff, Florida. The bill of lading, given by the New York Central and Hudson River railroad, was for one car of household goods and building material received from George

L. Harris, with destination to him at "Buffalo Bluff, Florida, via Palatka, without transfer." It is unnecessary to consider the matters connected with the first count of the declaration, and the first, second, and third pleas, intended as defenses to that count. These relate to the claim of plaintiff that defendant became responsible for the loss and damage because it did not deliver the car to the next succeeding road running to Palatka, as the bill of lading required; and it is apparent from the record that the verdict of the jury in favor of plaintiff could not have been founded on that count, as this would have been directly against the evidence, under the charge of the court for defendant, that unless defendant had knowledge of that clause of the bill it was not bound thereby. Whether that charge was correct is a question not involved in this appeal. But it was shown by the evidence that defendant was not informed of the directions of the bill of lading, and that it forwarded the goods to Buffalo Bluff by a connecting line of steamers from the terminus of its road to that point in accordance with the way-bill from an intermediate road, which did not contain the words "via Palatka, without transfer." Under the charge of the court, therefore, the jury could not have found for the plaintiff on the issues made from the first count and the three pleas thereto.

The second count, resting somewhat on the bill of lading, we also pass by, as we think the real merits of the case are to be determined on the issues made under the third count, which is, substantially, as follows: That defendant received the car-load of goods, undertaking to safely keep, transport and deliver the same, but, not regarding its duty as a common carrier, acted so carelessly and negligently that by reason thereof the said goods and property of plaintiff were as to part wholly lost, and as to other part greatly damaged. One plea is, that defendant safely carried the goods over its line and delivered the same to the next carrier in the same condition as they were received; and another plea is, that whatever injury and damage there was to said goods was caused by the careless and negligent packing of the same by the plaintiff. Issue was joined on these pleas; and the questions now to be considered are those which arose during the trial, on the evidence and the charges of the court connected with this part of the controversy. The evidence shows that the goods were delivered to the initial carrier in apparent good order, and that the car in which they were stored for trans-

portation was received by defendant to be transported over its road without other contract than such as attached to one of the intermediate carriers between the initial and last carrier, and that the goods unladen from the car by defendant at Jacksonville, Florida, were forwarded to the point of destination as mentioned in the erroneous way-bill from another intermediate carrier. Some of the goods were lost and others were damaged, and the recompense awarded by the jury to plaintiff for his loss and damage was \$866.75, \$87 of which was remitted by plaintiff. But the evidence does not disclose where the loss or damage occurred, except as to damage to building material, estimated at sixty dollars, and some of that damage the plaintiff himself attributes to the People's Line of boats, to which defendant delivered the material to be carried to Buffalo Bluff. It appears, however, from the testimony of plaintiff, that in an itemized estimate of his loss and damage, the aggregate amount is even greater than the amount of the verdict, so that the verdict may not have included this sixty dollars, or the *remittitur* may have been intended to cover it along with other items that made up the eighty-seven dollars. At any rate, the record does not inform us otherwise, and upon scrutinizing all the other items, we see none less likely to have entered into the verdict, or more likely to have entered into the *remittitur*.

In the absence of evidence to show where all other loss and damage occurred, we must resort to the rules which govern in such cases. The contract with the initial road, as shown by the bill of lading, was, that it was "not to transport the . . . goods beyond the limit of terminus of its own road." Hence its liability would be discharged upon delivering the car to the next connecting road, with the contents in as good condition as when received, and each succeeding road in the series over which the transportation was to be made would be discharged upon like delivery. As expressed by Justice Field in *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 107, "the general doctrine as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement

to that effect, such liability will not attach." The same court had previously said, in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, that the "rule which holds the carrier only liable to the extent of its own route, and for safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." See also *Knight v. Providence and Worcester R. R. Co.*, 9 Am. & Eng. R. R. Cas. 90, and *Borroughs v. Grand Trunk R. R. Co.*, 32 Am. & Eng. R. R. Cas. 467, and note 474. There was no special contract in the present case except that with the initial road, so that each of the connecting roads, on receipt of the car, was only responsible for its own default.

The rule as to the loss of goods is correctly stated by Rorer, we think, as follows: "In an action against a railroad company for goods lost by it as a common carrier, the burden of proof, first, is on the plaintiff to prove the delivery and acceptance of the goods to be carried; and secondly, the loss, and the value thereof. This makes a *prima facie* case for the plaintiff. To absolve the defendant from such *prima facie* liability, the burden of proof is then changed to the defendant, and it devolves upon him to overcome plaintiff's testimony by a preponderance of contradictory evidence; or else, being unable to do so, the burden of proof then rests upon the defendant to show the loss to have been occasioned by the enemies of the public or by the act of God. In default of such showing of either the one or other of these defenses, or of overcoming plaintiff's evidence, the liability rests upon defendant, unless the goods themselves contained, in their nature, elements of destruction occasioning their loss. In that case, this must be alleged and proven by defendant." Defendant may also relieve itself by showing legal contract exemption.

It is shown by the evidence that the car was delivered to defendant's road at Jesup, Georgia, and was transported thereon to Jacksonville. The loss of a portion of the goods, and the value of the same, is also shown; but where the loss occurred — whether on defendant's line or some other — is not shown. In such case, there being several carriers, and no contract except with the initial one, the law is, if the last carrier be sued, that it will be held liable, on the presumption that when the car was delivered to it, the contents were the same as when started by the first carrier. And this presumption applies also to the condition of the goods the car contained: See *Smith v. New York Cent. R. R. Co.*, 43 Barb. 225;

*Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538; *Laughlin v. Chicago etc. R'y Co.*, 28 Wis. 204; 9 Am. Rep. 495; *Shriver v. Sioux City etc. R'y Co.*, 24 Minn. 506; 31 Am. Rep. 858; *Lin v. Terre Haute etc. R. R. Co.*, 10 Mo. App. 125; *Leo v. St. Paul etc. R'y Co.*, 30 Minn. 438; *Montgomery etc. R'y Co. v. Culver*, 75 Ala. 587; 51 Am. Rep. 483. The reason of the rule of evidence is founded upon the better means the connecting carriers have to ascertain where the loss occurred. In the nature of the business, the party employing the transportation is not expected to follow up his goods to see that each carrier makes proper delivery to the succeeding one; but his reliance is, and the duty of each carrier is, that the goods shall be delivered as received. If not delivered at the point of final destination, it is but reasonable that the last carrier should account for them, and bear the responsibility of loss, if not able to show it never received them. Public policy requires this, under the system of transportation over several lines of road, for the protection of those who engage in such commerce, because there is less hardship upon the carrier to trace the loss, it being ordinarily impracticable for the owner to trace it without great trouble and expense, and sometimes to the consumption of the value of the property lost. Commenting on the first three of the above cases, in a note to *Knight v. Providence etc. R. R. Co.*, 9 Am. & Eng. R. R. Cas. 90, the writer aptly says that they "are based on the soundest principles of public policy. When a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he, of course, loses all sight of and all control of them. If an injury occurs or a loss is occasioned while *en route*, he has no conceivable means of proving in whose hands they were at the time of the loss or injury. It is therefore perfectly proper to shift the burden of proof on the carrier who is sued." In *Smith v. New York Cent. R. R. Co.*, 43 Barb. 225, the doctrine is expressed as follows: "The general rule is, that things once proven to have existed in a particular state are to be presumed to have continued in that state, until the contrary is established by evidence, either direct or presumptive. . . . Unless this rule is to be applied to goods delivered to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point or in the hands of which company the injury happened. But give to such party the benefit of the presumption that the goods he

has delivered in good order, in such case, continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make much more easily and readily than the converse can be proved by the owner. This is in perfect harmony with a well-settled rule of law as an exception to the general rule. The general rule undoubtedly is, that the burden of proof is always upon the party who asserts the existence of any fact which infers legal responsibility. But the exception is equally well established, that in every case that *onus probandi* lies on the party who is interested to support his case by a particular fact which lies more particularly within his knowledge, or of which he must be supposed to be cognizant. If the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party."

The cases cited, except one, relate to the last carrier. Strictly speaking, the defendant in this case was not the last carrier; but in the case of *Montgomery etc. Ry. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483, it is held that the same presumption which applies against the last also applies to an intermediate carrier. And it would seem that so far as the contents of a box or car are concerned, or the condition of those contents, the presumption which attaches to the last carrier must necessarily attach to each preceding one after the first, for there could not be such a presumption against the last carrier except through a continuity of presumptions against those preceding. The defendant, therefore, must be held to have received the car just as it left the point of original departure; and it stands in the relation of last carrier, according to the principle which binds the last, because by its action it was in position to know what goods were in the car when discharged, and the condition of those goods. The reason the last carrier is held liable in such cases is, that it is supposed to know what it received and delivered. The same reason applies in this case to defendant. It received and discharged the car. It knew, or ought to have known, what goods the car contained, and what was the condition of those goods. Its obligation was to deliver the goods to the next



carrier in like quantity and condition as they were received. Did it do that? There is nothing to show that it did. The strongest evidence for defendant that it did was that one of its agents broke the seal upon the car, took out what was found in it, and delivered the same to the People's Line of boats, alleged to be the next and final carrier. But this evidence fails to show what was delivered, or whether the lost goods were included in the delivery, — a fact peculiarly within the knowledge of defendant, after opening the car and delivering its contents. The burden of proof was on defendant to show full delivery, having been brought to that duty by the presumption that on receiving the car for transportation all the goods were in the car. But we go no further as to the liability of intermediate connecting lines than is authorized by the circumstances of this case, which so nearly assimilate it to that of a last carrier.

As to the injury to the goods when taken from the car, there is no dispute in regard to the broken state of a tool-chest. The other goods, according to some testimony for appellant, were not damaged, but this seems inconsistent with the labored effort to show that the goods were badly packed in the car, and is in conflict with the evidence of a witness for appellee, who received the goods for the People's Line. He says: "The goods were in very bad condition. They were broken up; the boxes were all smashed up, and a tool-chest was broken right in two." When asked where he first saw the broken furniture, he said: "If I am not mistaken, it was in the evening, and the damaged goods were in the car. They were badly smashed up. I don't think they were broken in taking out." It was the province of the jury to decide between the parties in this conflict of evidence, and this court, in the absence of anything to show improper influence operating on their minds, will not disturb their finding.

The sum of the situation, then, is this: The contents of the car were delivered to the first carrier in "apparent good order," and the jury, in the absence of proof to the contrary, were authorized to presume that when delivered to defendant the contents were all still in the car, and uninjured. It was then the duty of defendant to show delivery in the same condition to the next carrier. It has not done this; and having discharged the car, and being thereby in position to know what it did deliver, and having failed to show that in making delivery to the People's Line it delivered the goods that were

lost, and that such as were delivered were in the condition in which it received them, the jury were further authorized to presume that the loss and injury occurred on its line, except as to that part of the injury shown to have been done on the People's Line. In this state of the case, we must hold that the defendant is liable.

It is unnecessary to consider the several errors assigned in detail, as in the view we have taken of the case they are all covered, and, in our opinion, are either without good foundation or immaterial. The judgment in the case will be affirmed.

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**CARRIERS—LIABILITY OF CONNECTING LINES.**—Where a common carrier receives goods consigned beyond its terminus, the duty imposed upon it is to carry the same safely over its own line, and safely deliver them to the next carrier: *Alabama etc. R. R. Co. v. Thomas*, 89 Ala. 294; 18 Am. St. Rep. 119, and note discussing the liability of connecting carriers. To hold a carrier liable for injury by a connecting line, it must be shown that it contracted as principal for the entire distance; in the absence of such a contract, it would be liable for safe carriage only over its own line: *Kerrigan v. Southern P. R. R. Co.*, 81 Cal. 248; *Harris v. Howe*, 74 Tex. 534.

**CONNECTING CARRIERS—PRESUMPTION AS TO WHEN LOSS OCCURS.**—Where goods have been transported by successive carriers, and damaged subsequently to shipment, it is presumed, in the absence of evidence, that the damage was caused by the last carrier: *Texas etc. R'y Co. v. Adams*, 78 Tex. 372; 22 Am. St. Rep. 56, and note; *Columbus etc. R'y Co. v. Tellman*, 79 Ga. 608.

**CARRIERS—PRESUMPTION AS TO CONDITION OF GOODS—BURDEN OF PROOF.**—The presumption arises that perishable goods shipped in good order continue in that condition in the hands of a connecting carrier, and the burden of proof is on him to show the contrary: *Beard v. Illinois C. R'y Co.*, 79 Iowa, 518; 18 Am. St. Rep. 381, and note.

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## CITY OF JACKSONVILLE v. LEDWITHE.

[26 FLORIDA, 163.]

**MARKET—DEFINITION.**—A market is a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold; or in other words, it is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.

**MARKETS—POWER TO ESTABLISH, AND REGULATE—POLICE POWER.**—Authority to establish and regulate markets falls within the police power of the states, and the right to exercise such authority may be conferred by the state upon municipalities. It is also competent for the latter, when the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets.

**MARKETS—POWER TO ESTABLISH, IMPLIES POWER TO RESTRICT.**—A grant of power to a city to establish and regulate markets, standing alone,

seems to imply power to prohibit elsewhere than at duly established markets the sale of articles falling within the exercise of the police power.

**MARKETS — POWER TO ESTABLISH AND REGULATE, EXTENT OF.** — Under a grant of power to a city to "establish and regulate markets," and to "regulate the vending of meat, poultry, fish, fruit, and vegetables," the city may prescribe and restrict the time and places for the sale of the articles mentioned, by ordinance, and such restrictions as to time and places being reasonable with reference to the welfare of the community, and not being in general restraint of trade, it may likewise prohibit the sale of such articles elsewhere.

**MARKETS — POWER TO ESTABLISH, INCLUDES POWER TO PROVIDE SITE.** — Authority to establish and regulate markets implies power to purchase or provide the site and erect necessary buildings and stalls, and when provided, by lease, purchase, or other lawful mode, to adopt reasonable and usual rules and regulations in regard to the market and the business transacted there, having in view the preservation of peace and good order and the health of the community.

**MARKETS — POWER TO ERECT OR LEASE.** — Where the real or principal object of a city in erecting or leasing a building is to establish a market, the appropriation of a portion of the building to other purposes, as for the holding of courts, does not render the erection or leasing of the building illegal.

**MARKETS — POWER TO REGULATE — MONOPOLY.** — Where reasonable facilities for sale at markets are given, a regulation restricting the sale of articles within the police power, or which the health or welfare of the community requires should be regulated, to markets exclusively is not an illegal prohibition of trade or the creation of a monopoly.

**POLICE POWER — SUBJECTS OF, HOW DETERMINED.** — The courts are the final judges as to what are proper subjects of the exercise of police power, and the legislature cannot arbitrarily make that a subject which from its nature is not so.

**POLICE POWER — STATUTORY CONSTRUCTION.** — When a statute authorizes an exercise of police power in such broad terms as to include subjects which are not as well as those which are subjects of such power, the exercise of the power will be restricted to things which are the legal subjects of such power.

**MARKETS — POWER TO ESTABLISH AND REGULATE, MUST BE STRICTLY FOLLOWED, AND CANNOT BE DELEGATED.** — Where the power to establish and regulate markets is confined by the grant of power to the deliberative judgment or discretion of the law-making power of the municipality, the grant must be strictly followed, and the power cannot be delegated to the judgment or discretion of one constituent element of such municipal power, nor to the judgment or discretion of others.

**MARKETS ARE NOT SUBJECT, AS OCCUPATIONS, TO TAXATION** for revenue under charter power given a city to levy and collect taxes for the purposes of revenue upon "all property and privileges taxable by law for state purposes," and to license, tax, and regulate certain named occupations, "and all other privileges taxable by the state." The word "privileges," as thus used, means only other occupations of like kind as those designated, and not a technical privilege or franchise such as a market.

**MARKETS — POWER TO ESTABLISH AND LICENSE.** — Power granted to a city to establish and regulate a market includes power to license the keeper

thereof. The license fee exacted is not, however, a tax for revenue, but a charge under the police power.

**MARKET. — RIGHT TO LICENSE** a market, no power being given to also tax it for revenue, gives a municipal corporation power to impose such charge for the license as will cover not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the business, but nothing beyond this limit.

**MARKETS — LICENSE TO SELL DOES NOT CONSTITUTE.** — A license to sell meats or other things is not a grant to maintain a market, within the meaning of a legislative grant of power to establish and regulate markets.

**MARKETS. — GRANT OF AUTHORITY TO REGULATE VENDING OF MEATS** and vegetables will permit a city to ordain general regulations, applicable to all alike, as to when and where those articles may be sold; but such grant is not one conferring the franchise of establishing a market, and only a power to regulate the sale of articles which but for it could be sold anywhere and at all times.

**MARKETS. — POWER TO ESTABLISH MARKETS CANNOT BE USED** to create a monopoly of the right to sell, and the right to sell at markets must be secured to all alike, on the same conditions.

**MARKETS. — GRANT OF AUTHORITY TO REGULATE VENDING OF MEATS, etc.,** is one of police power, to be exercised upon considerations referable to the public health, and welfare of the community, and not so as to create a monopoly, but so as to afford the same rights to all alike, upon the same conditions. Under such authority, the hours of the day, and the mode or manner of and rules for conducting the business, may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations.

**MARKETS. — GRANT OF AUTHORITY TO REGULATE SALE OF MEATS, etc.,** does not authorize the imposition of taxes for revenue purposes, but it authorizes the imposition of fees and charges such as may be required to cover the cost of inspecting the articles exposed for sale, and of the police supervision of the business necessary to prevent its becoming harmful to the community.

**MARKETS. — POWER TO ESTABLISH MARKETS INCLUDES POWER TO REMOVE** or change their location from place to place as the convenience and necessities of the community may dictate.

**POLICE POWER. — RIGHT TO EXERCISE** police power cannot be parted with, or impaired by contract.

**ORDINANCES — WHEN MUST BE CONSIDERED TOGETHER.** — When an ordinance is enacted and approved establishing a public market, providing that no one shall sell certain articles at any other place unless expressly authorized to do so by the city council, and another ordinance, for the establishment of private markets for the sale of the same articles, is passed on the same day, but approved subsequently to the other one, the two ordinances must be considered together as one, for the purpose of ascertaining the intent of their makers.

**ORDINANCES IN PARI MATERIA.** — Where parts of an ordinance or of two ordinances are *in pari materia*, and are so connected or dependent upon each other that it cannot be presumed that their makers would have enacted one without the other, and one or more of the parts are void, the whole is void, and must fall.

*J. M. Barrs, and Fletcher and Wurtz, for the appellants.*

*Cooper and Cooper, for the appellee.*

RANEY, C. J. The act of May 31, 1887, chapter 3775, establishing the municipality of Jacksonville, provides, in section 4 of article 3, that the mayor and city council "shall have power by ordinance . . . to make regulations to secure the general health of the inhabitants and to prevent and remove nuisances; . . . to provide for and regulate the inspection of beef, pork, flour, meal, and other provisions, oils, whisky, and other spirits in barrels, hogsheads, and other vessels; to regulate the inspection of milk, butter, lard, and other provisions; to regulate the vending of meat, poultry, fish, fruits, and vegetables; to restrain and punish the forestalling and regrating of provisions, and to establish and regulate markets; . . . and to pass all ordinances necessary for the health, convenience, and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation."

The substance of the market ordinances of Jacksonville, as they stood on September 10, 1889, the time the bill in this case was filed, is, omitting the penal provisions as to a violation of the same, as follows: The public-market ordinance makes every day except Sunday a public market day, and constitutes the market buildings on water-lot 24, at the foot of Market Street, and "not elsewhere," the public market; and ordains that stalls, stables, or space in this market shall be rented to butchers or others desiring to hire the same by the month, or such longer period as may be desirable, upon such terms and for such sum as the board of public works shall determine. It also provides that no person shall sell any fresh beef, fresh pork, or mutton, or establish or maintain any market, stall, or shop for the keeping or sale of fresh beef, pork, or mutton, at any place within the corporate limits, except at the public market, unless such person or persons shall be expressly authorized to do so by the city council; provided, however, that producers bringing vegetables, poultry, eggs, or other country produce to the city for sale shall be permitted to sell the same free of tax anywhere within the city.

The private-market ordinance provides that private markets may be established, regulated, and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the city except with

the permission of the city council granted by resolution, and not more than one stall shall be permitted or licensed within the same building. Private markets must be constructed and maintained in accordance with specifications, rules, and regulations approved by the city board of health governing the same, and prescribing the size and character of stalls, and no permit for the establishment or maintenance of any private market shall be granted except upon a petition indorsed by the city board of health. No person can maintain or do business in a private market except upon paying to the city treasurer for a license the sum of five dollars per month for each and every stall used, and no person shall do the business contemplated by this ordinance except upon stalls licensed as heretofore provided.

A market, says Blackstone, is a franchise or liberty derived from the crown by grant, or by prescription which supposes a grant: 2 Bla. Com. 37; the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging, being in England within the king's prerogative as to domestic commerce: 1 Bla. Com. 274; such prerogative consisting in the discretionary power of acting for the public good where the positive laws are silent, and if it be abused by him to the public detriment, such prerogative is exerted in an unconstitutional manner: 1 Bla. Com. 252. In Jacob's Law Dictionary, as well as that of Tomlins, a market is defined to be the liberty, by grant or prescription, whereby a town is enabled to set up and open shops, etc., at a certain place therein, for buying and selling and better provision of such victuals as the subject wanteth; it being less than a fair, and usually kept once or twice a week. Bouvier's definition is: A public place and appointed time for buying and selling; a public place appointed by public authority, where all sorts of things necessary for the subsistence or for the convenience of life are sold. In *Ketchum v. City of Buffalo*, 21 Barb. 296, it is said, citing Crabb's Law of Real Property, that a market is the privilege within a town to have a market, and the franchise may be granted to natural persons or bodies politic; the grantee of the franchise has the right to have the market, but the public have also an interest in the market, and the grantee of the franchise is bound to provide suitable accommodations for those who attend the market. Judge Dillon, in his work on municipal corporations, note 4 to section 380, quotes the definition given by

Judge Breeze, which is: A designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale. See also *Cincinnati v. Buckingham*, 10 Ohio, 257; *McLin v. City of Newbern*, 70 N. C. 12; *City of Burlington v. Dankwardt*, 73 Iowa, 170.

The public character of markets is further illustrated by *Prince v. Lewis*, 5 Barn. & C. 363, where the grantee of the market for the buying and selling of vegetables, fruits, flowers, roots, and herbs had for his own profit permitted part of the space to be used for other purposes than those specified in the grant, and the residue of the space became insufficient for public accommodation, and there was not, on ordinary occasions, space within the market for carts and wagons resorting thither with vegetables, etc., and it was held that the owner of the market could not maintain an action against an individual for selling vegetables in the neighborhood of the market, and thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place he gave notice to the seller that there was room within the market. Again, in *Mosley v. Walker*, 7 Barn. & C. 55, it is said by Bayley, J.: I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it at such parts as will, from time to time, yield to the public reasonable accommodations; and that if the space once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or if not, to get land from other people, in order that the market, which was originally granted for the benefit of the people, as well as for the benefit of the grantee, may be effectually held, and that the public may have the benefit which was originally intended they should derive from it.

In the case of *Mayor of Penryn v. Best*, L. R. 3 Ex. D. 292, decided in 1878, the court said: "The mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *Mayor of Macclesfield v. Chapman*, 12 Mees. & W. 18. It is pointed out in the judgment that an old case (*Prior of Dunstable's Case*, 11 H. 6, f. 19 a, and cited in *City of London's Case*, 8 Rep. 127 a) had been erroneously supposed to decide the contrary. It may also be

considered as decided by the case of *Earl of Egremont v. Saul*, 6 Ad. & E. 924. We feel bound by these authorities, although dicta may no doubt be found to the contrary: See *Mosley v. Chadwick*, in note to *Mosley v. Walker*, 7 Barn. & C. 47. The second conclusion by which we are bound is, that such a right as is contended for may be acquired by immemorial enjoyment or prescription: *Mosley v. Walker*, 7 Barn. & C. 47; *Mayor of Macclesfield v. Pedley*, 4 Barn. & Adol. 397." In the court of appeal this view of the law was affirmed, though the judgment of the lower court was reversed on the ground that the right to prevent butchers from selling at their private shops on market days, within the limits of the franchise, was shown by the evidence to exist by prescription: L. R. 3 Ex. D. 292, 297 et seq.

In our own country the authority to establish and regulate markets falls within the police power of the states, and the right to exercise such authority may be conferred by a state upon municipal corporations; and it is competent for these corporations, where the delegation of power is sufficient, to prohibit the sale of marketable articles outside of the regularly established markets: Dillon on Municipal Corporations, secs. 141, 380; *City of Bowling Green v. Carson*, 10 Bush, 64; *First Municipality v. Cutting*, 4 La. Ann. 335; *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328.

The question whether or not the grant of the power to "establish and regulate markets" implies, when standing alone, authority to prohibit elsewhere than at duly established markets the sale of articles falling within the exercise of the police power, need not be decided in this case, although it would seem that authorities of great respectability sustain the affirmance of it, and some of them holding that such is the current of authority: *Bush v. Seabury*, 8 Johns. 418; *Village of Buffalo v. Webster*, 10 Wend. 100; *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Ex parte Canto*, 21 Tex. App. 61; 57 Am. Rep. 609; *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328; *Morris v. Mayor*, 2 La. 217; *City of Bowling Green v. Carson*, 10 Bush, 64; *Winnsboro v. Smart*, 11 Rich. 551; Dillon on Municipal Corporations, sec. 380; *Ash v. People*, 11 Mich. 347; 83 Am. Dec. 740; *St. Louis v. Weber*, 44 Mo. 547. There are, however, authorities to the contrary: *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789; *Caldwell v. Alton*, 33 Ill. 416; 85 Am. Dec. 282. See also *City of Bloomington v. Wahl*, 46 Ill. 489; *City of St. Paul v. Laidler*, 2 Minn. 190; 72 Am. Dec. 89.



In addition to the grant of authority to "establish and regulate markets," the legislature has, as appears in the first paragraph of this opinion, expressly authorized the mayor and council to "regulate the vending of meat, poultry, fish, fruit, and vegetables," and under this grant we are satisfied that they may by ordinance prescribe the time and places for the sale of the articles it covers; and such restrictions as to times and places being reasonable with reference to the welfare of the community, and not being in general restraint of trade, they may likewise prohibit the sale of such articles elsewhere. That the sale of them may, under this grant, be restricted to markets duly established under the other, where the regulations do not constitute an illegal restraint or a prohibition of the trade, we do not doubt: *Tiedeman's Limitations of Police Power*, sec. 104; *City of St. Paul v. Traeger*, 25 Minn. 248, 255; 33 Am. Rep. 462; and authorities cited *supra*.

Authority to establish and regulate markets implies, beyond question, the power to purchase or provide the site and erect necessary buildings and stalls, and when provided, by lease, purchase, or other lawful mode, to adopt reasonable and usual rules and regulations in regard to the market and the business transacted there, and having in view the preservation of peace and good order, and the health of the community: *Dillon on Municipal Corporations*, sec. 382; *Ketchum v. Bufalo*, 14 N. Y. 356; *Smith v. Newbern*, 70 N. C. 14; 16 Am. Rep. 766; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; *Spaulding v. Lowell*, 23 Pick. 71; *Caldwell v. Alton*, 33 Ill. 417; 85 Am. Dec. 282. If the real and principal object is the building of a market-house, the appropriation of a portion of the building to other purposes, as for the holding of courts, does not render the erection of the building illegal: *Spaulding v. Lowell*, 23 Pick. 71; and the same rule will hold good where, as in the case before us, the premises are leased: *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80. An express grant of police power as to regulating the vending of meat, poultry, fish, fruits, and vegetables, as has been given to the city of Jacksonville, supplements the other with the restrictive authority as to the time and place at which any article within its meaning and purpose shall be sold. There is nothing in the act which excludes markets as the places to which the vending shall be restricted.

Where reasonable facilities for sale at markets are given, such a regulation is not a prohibition of trade, nor the crea-

tion of a monopoly, the subject-matter of the regulation being, as in the case of fresh meat and fresh fish, one which the health or welfare of the community requires should be regulated. It is argued by counsel for appellee that the language of the act includes the power to regulate the vending of all kinds of cured meat as well as of fresh meat; and if power is given to prohibit the latter, it is also as to the former, and hence it was not intended to give this power as to either. We do not admit that there is "prohibition" of the sale of fresh meats in the fact that an ordinance restricts its sale to market-houses; still, it is a sufficient answer to the argument made to say that if the language of the statute is broad enough to cover any kind of meat the vending of which cannot reasonably be dangerous to the health or welfare of the people, such language will be confined, when considered as authorizing the exercise of the police power, to the proper subjects of that power. It is well settled that the courts are the final judges as to what are proper subjects of its exercise, and the legislature cannot arbitrarily make that a subject which from its nature is not so: *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *Mugler v. Kansas*, 123 U. S. 623. It would be unreasonable to hold that the use of language so broad, when considered in the abstract, as to cover things not the subject of the police power shows a legislative intent not to authorize the exercise of the power as to proper subjects of it. Moreover, the provisions of the same section as to preventing nuisances, and regulating or licensing, or prohibiting and suppressing, theatrical and other exhibitions, and prohibiting and suppressing gambling-houses and other things, certainly do not limit the meaning and effect of a grant of the power to regulate the vending of meat or to establish and regulate markets.

The general law for the incorporation of cities and towns, as amended in 1877, section 22, page 250, McClellan's Digest, enacts expressly that the city or town council shall have power to establish market-houses, and to require each and every person who may have for sale any fresh meat or fresh fish to bring the same into the market and offer the same for sale only in the market; and in view of the absence of such an express provision from the charter act under consideration, it is contended that a legislative intention to withhold from the municipality of Jacksonville the authority to restrict such sales to market-places is manifested. No particular formula of words or expression is essential to convey a power. The

only question is, Does the language used in any special or general act clearly confer the power? As stated above, our opinion is, that both upon principle and authority the grant is unquestionably sufficient to do so in this case.

It is necessary to a judgment upon the validity of the above ordinances to inquire how the power to establish markets, or to regulate the same, or the vending of meats or other articles mentioned, can be exercised. The statute says: The mayor and city council shall "have power by ordinance" to do so: Acts of 1887, sec. 4, art. 3, c. 3775, p. 164. The first section of the same article enacted that "the legislative power of said incorporation shall be exercised by a city council," and this provision is retained in the section, as amended by an act approved May 16, 1889: Acts of 1889, c. 3952. The second section of the article of the act of 1887 provides that no bill shall become a law "until it shall have been signed by the mayor, except that it may be passed without his signature as herein provided. No ordinance, or portion of an ordinance, vetoed by the mayor shall go into effect unless the same be passed by two thirds of the whole number of members of the city council. If the mayor fail to return any ordinance at or before the next regular meeting after its passage, he shall be deemed to have approved the same, and it shall become a law without further action": Acts of 1887, p. 164. The second section of the same article of this act (p. 162) is to the effect that the mayor shall carefully examine all bills passed, and should any not meet his approbation, he shall return the same to the next regular meeting of the council, with his objections in writing, and he may veto objectionable features, and "approve" the residue of the bill. From these provisions it is plain that a market cannot be established, nor can regulations thereof, or of the vending of meats, poultry, fish, fruits, or vegetables, be made, except by municipal law duly passed by the council, and afterwards submitted to the mayor, and sanctioned by his approval attested by his signature, or which he has failed to return to the next regular meeting of the council after its passage, or which, having been returned to the council with his objections, has been passed over his veto by two thirds of the whole number of the council.

It is to be observed that by the public-market ordinance as given above no person can sell any fresh beef, fresh pork, or mutton, or establish any market, stall, or shop for keeping

or selling the same, or either of them, within the corporate limits of the city, except at the public market, unless such person shall be expressly authorized to do so by the city council. This provision appears in the ordinance as it was when adopted in January, 1889, and was not changed by the amendment made by the council and approved by the mayor July 30th of the same year. The private-market ordinance passed by the council July 30th, but not approved by the mayor until August 5th, provided, in its first section, that private markets might be established, regulated, and abolished at the discretion of the city council, but that no private market for the sale of fresh meats, fish, or vegetables should be maintained *except by and with the permission of the mayor and city council, granted by ordinance*; but an ordinance was passed and approved the thirtieth day of August, providing that this section should read as follows: "Private markets may be established, regulated, and abolished at the discretion of the city council, but no private market for the sale of fresh meats or fish shall be maintained within the limits of the city of Jacksonville, except with the permission of the city council, granted by resolution." The provision that not more than one stall should be licensed or permitted in the same building was added by the amendment passed September 6th, and approved the next day. The fifth section of the private-market ordinance, approved August 5th, repeals an ordinance of June 6, 1888, regulating and governing private markets, but it is not shown, nor is it material to know, what its provisions were. We may, however, remark that it does appear there was in the contract made between appellee and the city, in 1876, as to the public market established at the foot of Ocean Street, on water-lot No. 10, and continued, with renewals and modifications immaterial to mention, down to May 1, 1889, an express stipulation that all other markets then existing in the city should be abolished, and that be the sole and exclusive market, excepting such markets as might be legally existing under contract with the city.

We do not think it can be doubted that the purpose of the amendment of August 30th was to make the right to keep a private market for the sale of fresh meats, etc., dependent upon the permission of simply the council expressed by resolution, instead of the permission of the law-making power duly expressed according to the forms prescribed

by the charter act for making municipal law; and considering the ordinance as thus amended, and also as it stood after the subsequent amendment, approved September 7th, its meaning was, that the city council as a separate body might establish, regulate, and abolish, at its discretion, private markets, without its action being subjected to the co-ordinate action of the mayor or having gone through the course required by the statute to make it municipal law. It is too plain to admit of discussion that this cannot be done: *Ex parte Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; Dillon on Municipal Corporations, secs. 96, 357, 716, 779; Cooley's Constitutional Limitations, 249. Not that legislative action in the form of a resolution, and which has been passed by the council, submitted to the mayor, and received his approval, or not been returned by him, or, having been duly returned by him, has received the two-thirds vote, may not be an ordinance: Dillon on Municipal Corporations, secs. 307, 769, and notes; note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 633; but for the reason that markets cannot be established, nor can regulations for them, or for the vending of meat and other articles specified in the provision of the statute, be made by the council as an independent part of the city government, or in any other manner than by proper ordinance duly enacted as the statute has provided: *Horn v. People*, 26 Mich. 221; *Ruggles v. Collier*, 43 Mo. 359, and other authorities cited with it *infra*.

The amendatory section of August 30th took the place of and entirely superseded the first section as it was in the original ordinance of August 5th, and the consequence resulting from the omission of the Italicized words and the insertion of those proposing to delegate to the council the power to establish and regulate markets is, that there was, from the approval of the amendment, no valid provision for the establishment or regulation of private markets: Advisory opinion, 15 Fla. 785; *Basnett v. Jacksonville*, 19 Fla. 664; *State v. Commissioners*, 28 Fla. 483; *Saunders v. Provisional Municipality*, 24 Fla. 226. That which was in the old section, but was left out of the new, ceased to exist as a part of the municipal law because it was actually, and we must hold intentionally, omitted, and the invalidity of the substituted subject-matter in the new section, proposing to give to the council a power which it cannot legally exercise, does not change the fact that the Italicized provision of the original section is no

longer a part of the municipal law. The omitted matter is no longer in existence as a part of the section or to be construed by the courts.

Another part of this private-market ordinance to be noticed is its second section, which provides that such market must be constructed and maintained in accordance with specifications, rules, and regulations approved by the city board of health governing the same, and prescribing the size and character of stalls, and no permit for the establishment or maintenance of any market shall be granted, except upon a petition indorsed by the city board of health.

It appears that on the sixth day of August, or the day after the approval of the private-market ordinance, the board of health formulated and prescribed rules for the government of private markets. They prescribe, *inter alia*, that such a market shall have a water-tight floor of yellow pine heart plank or portland cement, or of both, as in the judgment of the board may be deemed necessary, at least one inch in thickness on a solid foundation, the grade of the floor; connections with the sewers and with the water-works; that the construction of all markets shall be subject to the supervision and approval of the city engineer and health-officer, and the market to the daily inspection of an officer of the health department; the size of the stalls (not less than three feet wide and six feet long), and that they shall be covered with a marble slab, white oil-cloth, or other "acceptable" substance, and furnished with "suitable" meat-block and with galvanized iron hooks; the hour at which the markets shall be closed, and the removal of meats afterwards; the washing of the stalls, floors, etc., and the use of disinfectants that may be prescribed by the board; and how meat shall be moved from one market to another, or transferred through the streets. The fifth of these rules is, that persons owning and operating private markets and wishing to continue the same, and those desiring to establish and maintain them, must immediately present to the health-officer or to the chairman of the board, for the action of the board, a petition to the city council; that it shall state the location, number of stalls, full specifications of the construction, size, and other details of the proposed market or building, together with an assurance that the applicant will, in case his application is approved by the board and granted by the city council, promptly comply with ordinances of the city and the rules of the board, adopted, or that may be adopted,

in relation to the payment of license, and the fulfillment of sanitary requirements and restrictions in the construction and operation of private markets.

These rules appear from an indorsement of the recorder to have been submitted to and adopted by the city council in regular session on the day they were formulated by the board.

They are intended to control the establishment of and to regulate markets. The establishment and regulation of markets must be effected by ordinance enacted or ordained in the manner prescribed by the statute. It cannot be done either by a board of health acting, in the language of the brief of appellant's counsel, "in the capacity of a committee from the council," nor by the council itself, nor by both. The board of health in prescribing these rules has done no more than the second section of the ordinance contemplated, and the attempted exercise of this authority by the board was as much unauthorized as the effort of the ordinance to delegate the power was illegal. A public duty which the legislature has confided to the deliberative judgment or discretion of the law-making power of a municipality cannot be delegated by the latter to the judgment or discretion of one constituent element of that power, nor to the judgment or discretion of others. To permit it to be done would be to defeat the will of the legislature as to whose judgment or discretion should direct the subject-matter of the duty confided: *Ruggles v. Collier*, 43 Mo. 359; *St. Louis v. Clemens*, 43 Mo. 395; *Sheehan v. Gleeson*, 46 Mo. 100; *Mattox v. Alexandria*, 68 Mo. 115; 30 Am. Rep. 776; *Whyte v. Mayor*, 2 Swan, 364; *Day v. Green*, 4 Cush. 433; *State v. Bell*, 84 Ohio St. 194; *Lord v. Oconto*, 47 Wis. 386; *Birdsall v. Clark*, 73 N. Y. 78; 29 Am. Rep. 105; *Hitchcock v. Galveston*, 96 U. S. 344; *Indianapolis v. Indianapolis Gas Light and Coke Co.*, 66 Ind. 396.

The special-market ordinance is alleged to be void because it also prescribes illegal prerequisites, and one of the prerequisites objected to is the license, and the charge of five dollars per month for each and every stall.

Section 4 of article 8 of the charter act, chapter 3775. authorizes the mayor and council "to levy and collect taxes upon all property and privileges taxable by law for state purposes; . . . to license, tax, and regulate auctioneers, taverns, peddlers, and retailers of liquors, and all other privileges taxable by the state; to license, tax, and regulate hackney-carriages, carts, omnibuses, wagons, and drays, and to regulate

and license the sale of fire-arms; . . . and to regulate, tax, license, or suppress the keeping and going at large of all animals within the city." The eleventh section of the act of May 31, 1889, chapter 3958, an act supplementary to chapter 3775, amends section 1 of article 12 of the parent act, retaining, however, the provision, "privileges may be licensed and taxed by city ordinances," and also enacting that the council may provide for licensing the keeping of dogs.

At the session of the legislature of 1887, at which the charter act, chapter 3775, was passed, a general revenue law, chapter 3681, was enacted, it having received the approval of the governor June 13, 1887, or thirteen days after the charter act was approved. This act imposes what was styled "license taxes" on different occupations and professions, and provides that no person shall engage in or manage the business, profession, or occupation mentioned therein, unless a state license shall be procured in the manner prescribed, and enacts that counties, incorporated cities, and towns may impose such further taxes of the same kind, upon the same subjects, as they may deem proper, but that they shall not impose any such tax on any business, profession, or occupation not mentioned therein, nor shall the tax imposed by them exceed fifty per cent of the state tax. The same limitation upon counties, cities, and towns is to be found in former general revenue laws, as it also is in the amendatory revenue law of May 28, 1889, chapter 3847. The revenue law of 1887, chapter 3681, imposes a license tax on auctioneers, "taverns" (or, what may be deemed the same thing, keepers of hotels and boarding-houses), peddlers, and retailers in spirituous, vinous, or malt liquors, but not on hackney-coaches, carts, omnibuses, wagons, or drays, and all of this is true of the act of 1889; and in each of these general revenue statutes there is to be found a proviso that the license-tax provision as to peddlers with boat, or horse and cart or carriage, shall not extend to boats and carts engaged in the sale of vegetables and plantation products, fish, and oysters. The question, assuming the five-dollar fee to be a tax for revenue, is: Does the special act authorize the imposition of such a license or occupational tax upon the franchise or business of a market? Counsel for appellants suggests that the right to maintain a market being a franchise, it is a privilege, and is therefore taxable. Admitting, as we do, that the right to keep a market and charge toll is a franchise, and consequently a privilege, within the



meaning of *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 72, *Washington v. State*, 13 Ark. 752, still, this admission is not conclusive in favor of the right of the city, under the above provisions of its charter act, to impose a revenue tax upon such markets or persons keeping them; for the meaning of the word "privileges" in the charter act, is unmistakable from the connection in which it is used. When the act gives power to levy and collect taxes upon all property and privileges taxable by law for state purposes, and to license, tax, and regulate auctioneers, taverns, peddlers, and retailers of liquors, and all other privileges taxable by the state, it is clear that the legislature did not use the word "privilege" to designate such things as are technically privileges and cannot ever be enjoyed or exercised in England except through the prerogative of the crown or under act of Parliament, or in this country by authority of law, but to denote other occupations and business of the same kind as those mentioned and that are taxable by law for state purposes. In a word, we think the meaning of the legislature, as shown by the language last referred to, was, simply, that whatever occupations were subjected to taxation by the state laws might be taxed by the city of Jacksonville, under an ordinance or ordinances duly passed, and none other; and this view is strengthened by the fact of the subsequent provisions of the municipal law as to hackney-carriages, carts, omnibuses, wagons, and drays, which were not subjected to "license taxes" by the act of 1887 or that of 1889, and hence the necessity for the special mention of them in the charter act. Moreover, this provision as to hackney-carriages, etc., would not have been inserted had it been the intention of the legislature to delegate to the mayor and council by the preceding provision the same power which the state has of selecting the subject of occupational or license taxes (Const., art. 11, sec. 5), instead of limiting it to the subjects named in the charter act and the revenue laws of the state. Markets are, then, not subject, as occupations, to taxation for revenue, under the charter act.

There was nothing in the provision of section 1 of article 12 of the act of 1887 as to "privileges," nor is there anything in the amendment of it made in 1889, that qualifies the above conclusion. That section, as it appears in the act of 1889, chapter 3953, reads, omitting the provision as to licensing dogs, as follows: "All property which is subject to state taxes shall be assessed and licensed for taxation, alphabetically,

for the entire city, without reference to wards. The assessment shall be made by the comptroller and his assistants, and the valuation of real and personal property shall be subject to be increased or diminished by the council, under regulations to be made by ordinance. Privileges may be licensed and taxed by city ordinances. . . . All the duties now devolved upon the recorder in reference to the levy and assessment of taxes shall devolve upon and be performed by the comptroller." It is evident that the purpose of the section is, not to designate the subject of taxation, but to regulate the manner of assessing and levying taxes on real and personal property, and of licensing and taxing the avocations declared elsewhere to be taxable, and designated here as those by the word "privileges." It prescribes the manner and mode of exercising the taxing power against the previously defined subjects of taxation.

Appellants do not admit, however, that the charge of five dollars is a tax levied for the purpose of raising revenue, but contend that it is a fee properly chargeable as incident to the power of police regulation, and, as such, is authorized. According to this private-market ordinance, no person can "maintain or do business in a private market," except upon paying to the city treasurer, for a license, the sum of five dollars per month for each stall; and no person can do business in any such stall or private market that is not so licensed. We have seen that by this ordinance not more than one stall can be licensed in the same building. Prior to an amendment of it, approved September 7, 1889, there was no such limitation upon the number of stalls in one building. Assuming that, under the power granted to the mayor and council, they may, by ordinance, authorize the establishment of public markets by private individuals, the same being controlled and regulated by the mayor and council by ordinance, according to the principles of the decisions in *Davenport v. Kelley*, 7 Iowa, 102 (notwithstanding *Le Claire v. Davenport*, 13 Iowa, 210), *Dillon on Municipal Corporations*, sec. 385, and note 4, *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80, *Indianapolis v. Indianapolis Gas Light and Coal Co.*, 66 Ind. 396, *Slaughterhouse Cases*, 16 Wall. 36, *Butchers' Union etc. Co. v. Crescent City etc. Co.*, 111 U. S. 746, *Villavaso v. Barthet*, 39 La. Ann. 247, our opinion is, that the power to do so includes, as a market is a franchise, the power to license. A permit to establish a market is, from the nature of a market,

a license; it is a permit to do something which could not be done before without such permit, and hence is the grant of a license. Besides this, as we have stated in the earlier part of this opinion, the power to establish markets is within the police power; and all this being true, we are unable to conclude that the power to charge, as a police regulation, a fee for the permit or license to establish and maintain a market, as distinguished from a permit or license for selling meats or vegetables therein, does not exist. It seems to us that it necessarily does. The fee, however, is not a tax for revenue, but a charge under the police power, and its amount is to be controlled by the principles governing in such cases. What amount of fee or charge can be exacted is a question upon which the authorities are in conflict. By some it is held that no more than the expense of issuing the license can be charged. Judge Cooley's view is, that the right to license an employment—no power being given to also tax it for revenue—gives the corporation authority to impose such a charge for the license as will cover, not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the business, but nothing beyond this limit; and this seems to us to be the better rule: Cooley's Constitutional Limitations, 244, and note 1; Cooley on Taxation, 408-410; *Van Hook v. Selma*, 70 Ala. 362; 45 Am. Rep. 85; *Ex parte Gregory*, 20 Tex. App. 210; 54 Am. Rep. 516; *Cincinnati Gas Light and Coke Co. v. State*, 18 Ohio St. 237.

A permit or license to a person to sell meats or fish, or other things, is not the grant of a right to maintain a market, within the meaning of the legislative grant to the municipality of Jacksonville of the power to establish and regulate markets. The establishment and regulation of a market means the right to establish and furnish certain places where the public may resort for selling and buying provisions or articles of immediate necessity, and where the owners of the articles may expose them for sale, and to regulate these places and the business done there, and includes also the right to make charges for the use of stalls and space used by those resorting there with their products to sell the same. Markets are public conveniences, and not a mere license or permit to a person to sell his marketable property. Though the grant of authority to regulate the vending of meat, poultry, fish, fruits, and vegetables will permit the legislative power of the city to ordain general regulations, applicable to

all alike, as to when and where those articles may be sold, it is not one conferring the franchise of establishing a market, but it is a power to regulate the sale of articles which but for it could be sold anywhere and at all times. The power to establish markets cannot be used to create a monopoly of the right to sell. It is not intended for any such purpose. The right to sell at markets must be secured to all alike, on the same conditions. The grant as to vending meats, etc., is one of police power, and it is to be exercised upon considerations referable to the public health or welfare of the community, and not arbitrarily, nor to create a monopoly in one or several persons, nor to prohibit the trades to which it applies. Though under it the hours of the day, the places and the mode or manner of and rules for conducting the business, may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations, and, as in the case of markets affording reasonably ample facilities for all who may desire to engage in vending such articles, the sales may be confined to specific places, yet all this must be done on principles of impartial and general regulation affording the same rights to all alike, upon the same conditions, and not in the exercise of a partial and discretionary or arbitrary will of the law-making power, or of any part of it: *Tiedeman's Limitations of Police Power*, 273, 274, 278; *First Municipality v. Blineau*, 3 La. Ann. 688; *Kennedy v. Phelps*, 10 La. Ann. 227; *City of New Orleans v. Stafford*, 27 La. Ann. 417; 21 Am. Rep. 563; *Villavaso v. Barthet*, 39 La. Ann. 247; *Belcher v. Farrar*, 8 Allen, 325; *Cooley's Constitutional Limitations*, 201; *Horn v. People*, 26 Mich. 221; *Mayor v. Radecke*, 49 Md. 217; 33 Am. Rep. 239; *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *Mintun v. Lorne*, 23 How. 435; *Logan v. Pyne*, 43 Iowa, 524; 22 Am. Rep. 261; *St. Johnsbury v. Thompson*, 59 Vt. 300; 59 Am. Rep. 731; *Clark v. Le Cren*, 9 Barn. & C. 52; *Chamberlain v. Compton*, 7 Dowl. & R. 597. It does not authorize the imposition of taxes for revenue purposes upon the occupation of vending; but it does, in connection with the grant as to inspection made in the same section, justify such fees and charges as may be required to cover the expense of inspecting the articles offered for sale, and of the police supervision of the business necessary to prevent its becoming harmful to the community. Though the right to engage in the business at the times and places, and under the

same conditions, applicable to all cannot be denied to any, the business may be so regulated as the public welfare may demand, and the courts will not interfere with the enforcement of a regulation, except where it shall be manifest that the protection of the public is not its purpose: *Austin v. Murray*, 16 Pick. 126; *Dillon on Municipal Corporations*, sec. 141, note 2; *Cooley's Constitutional Limitations*, 203. The police power is one whose existence is essential to the protection and welfare of the public; and while it should be used unhesitatingly and efficiently for the ends it was intended to subserve, it should not be used for other purposes, nor further than is necessary to fully effect the legitimate end in any particular case falling within its proper exercise.

It is plain from the record before us that the right claimed by Ledwith, the appellee, is that of maintaining a building where stalls and space are provided for butchers or others desiring to sell, for the use of which stalls and space he makes charges. For some years prior to May, A. D. 1889, his premises, at the foot of Ocean Street, had been the designated public market, controlled and regulated by the city, under an ordinance and a contract between the city and himself, which contract expired on the first day of that month. The expiration of this contract excludes from the case all question as to the effect which, if existing, it might have had on the right and power of the city authorities to change by ordinance the location of the public market, or, barring any other defects that may exist in the public-market ordinance of July 30, 1889, to establish the public market at the foot of Market Street, and abolish that at the foot of Ocean Street. As against the appellee, or any one whose premises or buildings had been the legally established public market, there can be no doubt of the right of the city authorities to remove the market to a different place, or to abolish an existing one, and establish a new market. Neither the appellee nor any other person, nor any corporate body other than the municipality of Jacksonville, acting through its law-making authority, has been given power by the legislature to establish markets within the territory of that city. In Florida, the legislature alone can confer such power. The power to establish a market includes the power to change the location of it from place to place as the convenience and necessities of the community may dictate: *Dillon on Municipal Corporations*, sec. 282; *Cooley's Constitutional Limitations*, 744, note 2; *Wart-*

*man v. City of Philadelphia*, 33 Pa. St. 202; *Gall v. Cincinnati*, 18 Ohio St. 563; *Cougot v. New Orleans*, 16 La. Ann. 21; *City of New Orleans v. Stafford*, 27 La. Ann. 417; 21 Am. Rep. 563; *Rex v. Cottrell*, 1 Barn. & Adol. 67; *Curwen v. Salkeld*, 3 East, 538; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80; *Villavaso v. Barthet*, 39 La. Ann. 247; *Butchers' Union v. Crescent City Co.*, 111 U. S. 746; *Presbyterian Church v. City of New York*, 5 Cow. 508. These authorities show how groundless the vested right theory of complaint, based on the injury to the value of his property through decrease of rental, is, and how firmly set is the rule that the police power cannot be parted with or impaired by contract or barter.

The second section of the public-market ordinance shows by the words, "unless such person or persons shall be expressly authorized so to do by the city council," particularly when they are considered in connection with the private-market ordinance, that it was not the intention of that ordinance to prohibit the sale of fresh meats, etc., elsewhere than the so-called public market. On the same day—July 30, 1889—that the first section of this ordinance was so amended as to establish the public market at the foot of Market Street, the so-called private-market ordinance was passed, although the latter did not receive the sanction of the mayor till the fifth day of August; and it is this private-market ordinance that was intended by the law-making power of Jacksonville to furnish the rule under which the express authority suggested by the second section of the public-market ordinance might be obtained for selling, or offering for sale, fresh beef, fresh pork, or mutton elsewhere than at the public market, or establishing or maintaining a market, stall, or shop for the sale of the same. The two ordinances are to be considered together, or as one, in seeking for the intention of the municipal law-maker as to markets and the vending of the meats mentioned in them. Considering them together, we find that the manifest intention to permit and regulate sale elsewhere than in the *locus* of the public market, as well as that to permit other markets, has not been effectually ordained; or in other words, the ordinance governing such sales and markets is void because it purports to remit their establishment, maintenance, regulation, and abolition to the sole discretion of a body—the city council—that cannot exercise the power, and also to delegate to a committee—the city board of health—authority which the state legislature has committed to the law-making power of

the municipality. It is thus apparent that the city of Jacksonville, as represented in the expression of her legislative agency speaking for her, intended not only that there should be a public market at the foot of Market Street, but that there might be other places established at which sales could be made, yet that sales could not be except at the public market or a so-called private market; and to make this intention effectual, she has ordained that a person who violates the provision of the public-market ordinance as to selling at other places than the public market or a private market should be subject to fine or imprisonment. It happens, however, that the private-market ordinance is void, and the question arises as to what effect this fact has upon the validity of the above prohibitory provision of the public-market ordinance. In our opinion, it invalidates it, because it never was the intention of the law-making power of Jacksonville that sales should be confined to the public market; and to enforce it with the effect of prohibiting sales elsewhere, in the absence of valid regulations of such sales, would be to do what was never intended. Whether or not an ordinance restricting sales to one place in a city of the territorial extent and of the population of Jacksonville would be held to be valid if assailed as unreasonable, it is unnecessary to decide, as such cannot be said to have been the purpose in this case.

The rule as to statutes is, that part of an act may be unconstitutional without invalidating the whole of it. If all the provisions are connected in subject-matter, depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other, the whole act will be declared void. On the other hand, where some parts are not connected with or dependent upon others, as where a statute attempts to accomplish two or more independent objects, it may be void in part, and valid as to the residue. If its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions. If the valid and the void parts "are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue

independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them": Cooley's Constitutional Limitations, 177-179; *State ex rel. v. Deal*, 24 Fla. 293; 12 Am. St. Rep. 204. The same principles apply to city ordinances: Dillon on Municipal Corporations, sec. 421, and notes. A valid charter act is the constitution of a municipality as much as the work of a regularly chosen convention ratified by the vote of the people is the organic law of the state. It is evident that the purpose of the public and private market ordinances, considered together, is twofold. Outside of its prohibitory provisions, the object of the former was to provide a public market where persons could resort to sell and buy, as indicated above. The object of the prohibitory clause was to regulate the sale of certain articles, and it cannot be denied that it and the private-market ordinances are conditions, considerations, and compensations for each other. Surely the specified provision of the former, with the clause last quoted above, would not have been ordained without enacting the private-market ordinance, unless it should be assumed that it was deemed necessary to have the latter ordinance to make the quoted clause effectual; and that it was not so assumed, we are concluded by the fact of the enactment of the private-market ordinance. This prohibitory clause of the so-called public-market ordinance and the private-market ordinance are as connected with, conditional upon, and compensatory to each other as if they were in the same ordinance or section of an ordinance, and the invalidity of the latter ordinance is fatal to the specified provision of the former. To hold the contrary would be to enforce what was never intended by any branch of the law-making power of Jacksonville in passing or approving either of these by-laws.

It is evident that there is no valid regulation prohibiting sales elsewhere than at the public market, and for this reason there is no legal impediment to the sale in the appellee's building; and he should, in the absence of legal restriction of sales to other places, not be interfered with in the alleged use of the premises.

It may be well for us to remark that it is not to be inferred from anything said in this opinion that the municipal authorities may not avail themselves of all sources of knowledge and experience in framing rules and regulations, nor is the



power of the city to use all usual or proper agencies for the enforcement of the same. when duly ordained, to be doubted.

We have gone as far into the questions affecting the vendors of meat doing business in Ledwith's building as is necessary to a decision of the case. Ledwith is not such a vendor, and it is not proper that we should say more than we have upon any question not affecting his rights.

The decree is affirmed.

**POWER OF MUNICIPALITIES TO ESTABLISH AND REGULATE MARKETS.** — This subject has already been discussed at considerable length in the note to *Caldwell v. City of Alton*, 85 Am. Dec. 286, and in prior notes in that series therein referred to. Hence it only remains to summarize the later cases and such as are not mentioned in the prior notes.

The cases agree that authority to establish and regulate markets falls within the police power of the states; that the right to exercise such power may be conferred by them upon municipal corporations; and that the latter may, when the delegation of power is sufficient, prohibit the sale of marketable articles elsewhere or outside the regularly established markets. Although there is a seeming conflict in the earlier cases on the question as to whether or not the delegation of authority to establish and regulate markets, when standing alone, includes power to prohibit the sale of goods and products outside of duly established markets, the weight and current of the later authorities show, conclusively that the delegation of the first-mentioned power includes the other: *Ex parte Byrd*, 84 Ala. 17; 5 Am. St. Rep. 328; *Natal v. Louisiana*, 139 U. S. 621, 624; *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Ex parte Cunto*, 2 Tex. App. 61; 57 Am. Rep. 609; *People v. Keir*, 78 Mich. 96; *Gossigi v. New Orleans*, 41 La. Ann. 522; *State v. Gisch*, 31 La. Ann. 544; *State v. Pendergrass*, 106 N. C. 664; *St. Louis v. Weber*, 44 Mo. 547; *Newson v. Galveston*, 76 Tex. 559. These cases also decide that a delegation of such power confers authority to confine the business referred to in the ordinance to certain hours of the day, to certain localities or buildings in the city, and to the manner of its prosecution within such hours, localities, and buildings.

Respectable authority, however, may still be found maintaining that such delegation of authority alone will not confer power to limit the sale of marketable articles elsewhere than at the established market during market hours: *Bethune v. Hughes*, 28 Ga. 560; 73 Am. Dec. 789 (overruled, in effect, under a subsequent statute, in *Budkins v. Robinson*, 53 Ga. 613); *St. Paul v. Laidler*, 2 Minn. 190; 72 Am. Dec. 89; *St. Paul v. Traeyer*, 25 Minn. 248; 33 Am. Rep. 462; *Caldwell v. Alton*, 33 Ill. 417; 85 Am. Dec. 282; *Bloomington v. Wahl*, 46 Ill. 489; *Burlington v. Dankwardt*, 73 Iowa, 170.

In *Natal v. Louisiana*, 139 U. S. 621, it was said that "in states where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are matters of municipal police, and may be intrusted by the legislature to the city council, to be exercised as in its discretion the public health and convenience may require." Hence an ordinance prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of fine or imprisonment, is valid.

To make a grant of power to establish and regulate markets effectual, it

is necessary that suitable market-houses should be provided, and it follows as a necessary consequence that such grant of power includes power, beyond question, to purchase or provide, by lease or otherwise, the site, and to then erect the necessary buildings and stalls, to be followed by reasonable and just rules for the regulation of such market, with reference to the peace, health, and good order of the community. Such rules must be of a police or sanitary character, and must not operate so as to create a monopoly or to restrain trade. They must be restricted to reasonable regulation: *Caldwell v. Alton*, 33 Ill. 417; 85 Am. Dec. 282; *Smith v. Newbern*, 70 N. C. 14; 16 Am. Rep. 766; *Ketchum v. Buffalo*, 14 N. Y. 356. Power to erect a market-house includes power to repair it: *Smith v. Newbern*, 70 N. C. 14; 16 Am. Rep. 766; to employ architects to prepare plans for its erection: *State v. Paterson*, 34 N. J. L. 163; *Peterson v. New York*, 17 N. Y. 449; to lease the unoccupied part of the market-house, when erected, to private persons: *Spaulding v. Lowell*, 23 Pick. 71; and to lease a building for market purposes if that is deemed preferable to building: *Wade v. Hampton*, 77 N. C. 460; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80. The power to erect also includes power to contract for building, and such contract is as binding upon the municipality as a contract entered into by a private individual concerning his private business is upon him: *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80. A municipality may contract with a private person, authorizing him to build a market-house, rent stalls, and collect dues during a specified period, upon the consideration that the site, which is his property, together with the improvements thereon, shall be conveyed to the city absolutely, and in good order, upon the expiration of his term: *State v. Natal*, 41 La. Ann. 887.

Power to establish market-houses, to require provisions to be sold there, and to forbid their sale elsewhere cannot be fettered by contract, but must be left free to be exercised at all times, whether in conferring, or withholding market privileges when once conferred; and one who has expended money in preparing and equipping a private market, established under authority of the city, is chargeable with notice that the city may at any time forbid him to continue and keep his market at that place. The withdrawal of the privilege does not divest the citizen of a constitutional right, nor deprive him of his property; nor is an ordinance withholding such privilege in restraint of trade: *Newson v. Galveston*, 76 Tex. 559; *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. Rep. 80.

The power to establish a market, either public or private, undoubtedly includes authority to change or shift its location from place to place as the convenience or necessity of the community may require: *Wartman v. Philadelphia*, 33 Pa. St. 202; *Gall v. Cincinnati*, 18 Ohio St. 563; *New Orleans v. Stafford*, 27 La. Ann. 417; 21 Am. Rep. 563. In *Attorney-General v. Detroit*, 71 Mich. 102, it was said: "That a city may change the locations of markets, where it will not injuriously affect public rights, is very generally accepted. That it cannot capriciously destroy them, unless the charter gives distinct power to do so, seems to be a necessary inference from the general rules governing the use of franchises, which are seldom, and in cases of public enjoyment are never, given as mere sources of revenue, without regard to the public convenience."

Under a grant of power to establish and regulate markets, the power cannot be delegated to private individuals, or to certain parts of the municipal law-making power, so that the persons to whom the power is granted

may regulate and control the markets thus erected and established: *Davenport v. Kelley*, 7 Iowa, 102; *State v. Paterson*, 34 N. J. L. 163.

Power to establish and regulate markets does not, of itself, confer power to levy taxes; and the right to impose a reasonable license for market privileges does not give the right to use the license as a mode of taxation for revenue, in the absence of clear intent to that effect in the city charter: *State v. Bean*, 91 N. C. 554. To reimburse the city for maintaining and supervising the market, it unquestionably has the right to impose a license fee upon those enjoying the market privileges, or occupying stalls therein: *Le Claire v. Davenport*, 13 Iowa, 210; *State v. Bean*, 91 N. C. 554; *In re Nightingale*, 11 Pick. 167; *Pigeon v. Montreal etc. Court*, 17 Can. Sup. Ct. 495; *State v. Gisch*, 31 La. Ann. 544. A license of twenty-five cents per day for the privilege of occupying a stall in a city market is reasonable, and may be enforced: *Cincinnati v. Buckingham*, 10 Ohio, 257.

A municipality, in locating its markets, is restricted to such places as will not create a nuisance, and consequently it cannot locate a market so as to obstruct a street, or a private person's place of business thereon: *Wartman v. Philadelphia*, 33 Pa. St. 203; *Columbus v. Jacques*, 30 Ga. 506.

As we have shown in the beginning of this note, the power to establish markets necessarily includes power to restrict the sale of provisions to the locality provided, and after markets and their limits have been established, power is necessarily implied to prescribe regulations by ordinance for their proper conduct and control; and the only limit upon this power is, that the regulations must be uniform in their operation upon all persons. They must not discriminate, be in restraint of trade, nor create a monopoly, but must be calculated to promote the general welfare of the inhabitants: *Bloomington v. Wahl*, 46 Ill. 489. The method of selling goods, the arrangement of stalls and the articles therein, and the method of weighing provisions may all be prescribed: *Snell v. Belleville*, 30 U. C. Q. B. 81; *Le Claire v. Davenport*, 13 Iowa, 210. The sale of meat may be prohibited, except in places designated by the market board, and in the public markets: *Kelly v. Toronto*, 23 U. C. Q. B. 425. So the wholesale and retail trade in the market may be separated by prescribing a penalty for retailing within the wholesale limits: *Strike v. Collins*, 54 L. T., N. S., 152. The sale of fresh meat in less quantities than a quarter may be prohibited except at public markets: *St. Louis v. Weber*, 44 Mo. 547; *Davenport v. Kelley*, 7 Iowa, 102. So the sale of meat in any quantity may be prohibited, except at specified places: *Buffalo v. Webster*, 10 Wend. 99. So the sale of oysters may be prohibited outside the market: *Morano v. Mayor*, 3 La. 217. And where an adequate public market has been established, the opening of any other market may be prohibited and made unlawful: *State v. Gisch*, 31 La. Ann. 544. And an ordinance prohibiting any one living within twenty miles of the market occupying a stand until he shows that his goods are the produce of his own or an adjoining farm is valid: *Commonwealth v. Rice*, 9 Met. 253. An ordinance prohibiting the sale of meat without license, and excepting farmers, will not bring within the exception a butcher by trade who sells meat produced on his farm: *Rochester v. Pettinger*, 17 Wend. 265. An ordinance, however, granting the exclusive right to maintain a market to one or more persons for a definite period of time is unlawful as creating a monopoly: *Gale v. Kalamasee*, 23 Mich. 344; 9 Am. Rep. 80. So an ordinance is unreasonable and in restraint of trade which prohibits the sale of fresh meat at any time during the day within the city limits except at a designated market.

The restriction can only extend to reasonable market limits during certain

hours: *Bloomington v. Wall*, 48 Ill. 439; and when the limits of the market boundary are specified, the ordinance operates only within those limits, and cannot be made to extend throughout the whole city: *Caldwell v. Alton*, 33 Ill. 417; 85 Am. Dec. 282. So a city has no right, without express authority, to shut out gardeners and farmers, or other produce-raisers, from access to the general market, without giving them a substitute for it, by providing that such produce shall only be sold by sellers who have leased stalls in such market: *Hughes v. Recorder's Court*, 75 Mich. 674; 13 Am. St. Rep. 475. An ordinance prescribing a penalty of not less than one or more than five dollars for every hour that a person shall keep his wagon within the limits of the market, without the consent of the clerk thereof, and after notice to remove, is unreasonable, and void: *Commonwealth v. Wilkins*, 121 Mass. 266.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**ROSEN V. CHICAGO AND GRAND TRUNK RAILWAY  
COMPANY.**

[188 ILLINOIS, 72.]

**PERSONS TRAVELING UPON RAILROAD TRACKS AS HIGHWAYS ARE GUILTY OF GROSS NEGLIGENCE**, and the railroad company is responsible only for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto. The company does not owe to such persons the duty to furnish flagmen or to ring a bell. These are for the benefit of those about to cross railroad tracks.

**VERDICT FOR DEFENDANT MAY BE DIRECTED WHEN.** — Where there is no evidence to support the plaintiff's cause of action, the court may, at the close of the plaintiff's case, direct the jury to find for the defendant.

**ACTION** on the case. The opinion states the facts.

*Burke and Hellett, and John Gibbons, for the appellant.*

*F. H. Culver, for the appellee.*

**SCHOLFIELD, J.** This was an action on the case, by appellant, for negligence of appellee, causing personal injury to appellant. The superior court, after hearing all the evidence offered on behalf of appellant, instructed the jury to find for appellee. Verdict and judgment thereon were thereupon rendered in behalf of appellee, and that judgment was affirmed in the appellate court for the first district. The only question here is, whether there is evidence in the record which would support a judgment in behalf of appellant.

The declaration contains four counts, in each of which it is alleged appellant was in the observance of due care for his

personal safety at the time that he was injured. In the first count, the negligence of appellee is alleged to have been in carelessly and improperly driving and managing its engine. In the second count, it is alleged to have been in running at a greater rate of speed than provided by an ordinance of the city. In the third count, it is alleged to have been in not ringing a bell. In the fourth count, it is alleged to have been in omitting to have a flagman at the crossing.

At the time appellant was injured, he was traveling longitudinally along the main track of appellant's railway, where trains were frequently passing in each direction. The company owed him, therefore, no duty in respect to furnishing flagmen or ringing a bell, which are for the benefit of those about to cross railroad tracks: *Chicago etc. R'y Co. v. Eininger*, 114 Ill. 79. Those who travel upon railroad tracks as highways are themselves guilty of gross negligence, and the railroad company is only responsible for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto: *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 507; 22 Am. Rep. 112; *Illinois Cent. R. R. Co. v. Hetherrington*, 83 Ill. 510; *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630.

There is no evidence tending to show negligence in driving and managing appellee's engine, or that its engine was running at a greater rate of speed than provided by ordinance. Appellant testified that he was walking south on the railroad track, and, observing an engine approaching on the same track, he stepped over on another track, and as he did so, he was struck and injured by an engine approaching from his rear. As he stepped on the other track, he says he did not look in the rear, from which the engine that struck him was approaching, and that he walked only twenty-five or thirty feet until he was struck. There is no evidence that he was observed by those in charge of the engine that struck him, before he was struck, or, if he had been, that the engine could have been stopped by any management, however skillful, before he was struck. There is no ordinance in evidence limiting the speed of trains at this point, and no evidence tending to show that the engine was being run at a high and reckless rate of speed.

We find no cause to disturb the judgment below, and it is therefore affirmed.

Judgment affirmed.

**RAILROAD COMPANIES — DUTY TO TRESPASSERS ON THEIR TRACKS.** — A person walking upon a railroad track is a trespasser, and guilty of gross negligence, and if he is run over and killed, the company is not liable for damages for his death, unless willfully or wantonly caused: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630, and note; *Louisville etc. R. R. Co. v. Crawford*, 89 Ala. 240; *Burbank v. Illinois etc. R. R. Co.*, 42 La. Ann. 1156; *Brown v. St. Louis etc. R'y Co.*, 52 Ark. 120; *Central etc. Co. v. Denson*, 84 Ga. 774; *Bare v. Pennsylvania R. R. Co.*, 135 Pa. St. 95; *Brooks v. Lincoln St. R. R. Co.*, 22 Neb. 816; *White v. Central R. R. etc. Co.*, 83 Ga. 595.

**VERDICT.** — A court may direct a jury to find for the defendant, where, in case it should find for the plaintiff, it would be the duty of the court to set aside the verdict: *Blanchard v. Lake Shore etc. R'y Co.*, 126 Ill. 416; 9 Am. St. Rep. 630.

## CHICAGO AND NORTHWESTERN RAILWAY COMPANY v. CHAPMAN.

[123 ILLINOIS, 96.]

**COMMON CARRIER CANNOT LIMIT HIS LIABILITY BY STIPULATION IN RECEIPT.** — Under the statutes of Illinois, a common carrier is prohibited from limiting his common-law liability safely to deliver property intrusted to him for transportation at the place to which it is to be transported, by any stipulation or limitation expressed in the receipt given for such property; but those statutes do not prohibit common carriers from limiting their common-law liabilities by contract with the owner of property delivered for transportation.

**COMMON CARRIER MAY, BY EXPRESS CONTRACT, LIMIT HIS LIABILITY.** — A common carrier may, by express contract, limit his strict common-law liability to such damage as may occur on his own line of carriage, against loss by fire without his fault, and against other loss not attributable to his negligence, or that of his servants.

**COMMON CARRIER MAY REQUIRE SHIPPER TO FIX VALUE OF GOODS.** — A common carrier may require the owner of goods offered for transportation to fix their value, so as to protect himself against fraud in case of loss.

**COMMON CARRIER CANNOT EXEMPT HIMSELF FROM LIABILITY FOR LOSS RESULTING FROM HIS GROSS NEGLIGENCE.** — A common carrier cannot, even by express contract, exempt himself from liability for damages resulting from the gross negligence or willful misconduct of himself or of his servants or employees; nor can he shield himself as to any portion of the damages to person or property occasioned by his or his servants' gross negligence or willful misconduct.

**COMMON CARRIER CANNOT ARBITRARILY FIX VALUE OF GOODS, AND THEREBY LIMIT HIS LIABILITY.** — A common carrier cannot arbitrarily fix the value of goods delivered to him for transportation, and thereby limit his liability in case of loss. If a value be fixed by the carrier, and the contract of shipment is based thereon, the amount thus fixed will ordinarily determine the liability of the carrier. It will not, however, if untruthfully given in respect to property that the carrier had less opportunity to inspect and know the value of than the shipper, estop the carrier to show that the value was less than that fixed.

**LIMITATION OF VALUE IN CARRIER'S RECEIPT NOT BINDING ON SHIPPER WHEN.** — Where a common carrier receives property for transportation, charges what he sees proper, and makes out a bill of lading without asking any questions as to the value of the property, a clause in the bill of lading attempting to limit a recovery, in case of loss, to a certain sum does not amount to an admission on the part of the shipper that the property is worth no more than that sum, where the latter makes no representations to induce the fixing of the value of the property at that amount; nor does it affect the question that the carrier had at the time two classifications of such property, one limiting the amount of recovery, and the other not limiting the amount, but charging a higher freight rate, where no notice was given to the shipper at the time of any such classifications.

**ACTION on the case.** The horse referred to in the opinion was shown to have been a valuable race-horse, and was so injured by the accident as to be wholly worthless. The accident happened by the train in which the horse was being carried colliding with a construction train. There was a verdict and judgment for the plaintiff for \$8,290. The other facts are sufficiently stated in the opinion.

*W. C. Goudy, W. B. Keep, and R. N. Botsford, for the appellant.*

*A. H. Barry, and Sherwood and Jones, for the appellee.*

**SHOPE, C. J.** This is an action on the case, by appellee against appellant, as a common carrier, to recover damages for the loss of the plaintiff's horse while being shipped over appellant's railroad. There is little dispute as to the facts of the case. There was ample evidence to show gross negligence on the part of the servants of the defendant, from which the injury to the horse resulted.

By the ruling of the trial court in giving an instruction for the plaintiff, and in the modification of one asked by the defendant, the question of law is presented, whether it is competent for a railway carrier to limit or restrict, by contract, its liability for an injury to property, during its transportation, against the gross negligence of the carrier or its servants.

The act in respect of common carriers approved March 27, 1874, provides "that whenever any property is received by a common carrier to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in



the receipt given for such property." This is substantially re-enacted in section 33 of chapter 114, relating to railroads. These statutes do not, in terms, prohibit common carriers from limiting their common-law liabilities by contract with the owner of property delivered for transportation. Formerly, the restriction of a carrier's liability, when expressed in a mere receipt, often gave rise to the question as to whether the shipper had knowingly assented thereto, and this enactment was doubtless intended to obviate the difficulty growing out of that condition. In many respects, a railway carrier may, by express contract, limit its strict common-law liability. It may, by special contract, limit the liability to such damage or loss as may occur on its own line of carriage: *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92; *Chicago etc. R'y Co. v. Montfort*, 60 Ill. 175; *Field v. Chicago etc. R. R. Co.*, 71 Ill. 458; *Erie R'y Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Wabash etc. R'y Co. v. Jaggerman*, 115 Ill. 407. The carrier may limit its liabilities against loss by fire without its fault: *Van Schak v. Northern Transportation Co.*, 3 Biss. 394. And the liability may thus be limited as an insurer, and against other loss not attributable to its negligence or that of its servants, and may require the value of goods offered for transportation to be fixed by the shipper, to protect itself against fraud in case of loss.

The courts of this state have never held that the carrier may limit or restrict its liability for loss or damage resulting from its own gross negligence, or the gross negligence of its servants. On the contrary, it has been repeatedly and uniformly held that it cannot do so, even by express contract with the shipper. The question first arose in *Illinois Central R. R. Co. v. Morrison*, 19 Ill. 136, and it was there said: "We think the rule a good one, as established in England and in this country, that railroads have the right to restrict their liabilities as common carriers by such contract as may be agreed upon specially, they still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate." And substantially the same language is used in *Illinois Central R. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260, and in *Illinois Central R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85. In *Illinois Central R. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301, it was held that a railroad company may restrict its liabilities for loss or injury occurring during the transportation

of property, the carrier being still held liable for gross negligence or willful misfeasance. So in *Illinois Central R. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85, it is said "that although the railroad company might protect itself by contract against certain risks assumed by common carriers and belonging to their vocation, it is contrary to good morals and public policy that they should be allowed to stipulate against their own gross negligence, or that of their employees, or their willful default." In *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Dec. 596, the court holds that the contracts exempting carriers from liabilities are not to be construed as providing against loss or injury occasioned by actual negligence on their part. In the subsequent case of *Arnold v. Illinois Central R. R. Co.*, 83 Ill. 273, 25 Am. Rep. 383, it was said: "The doctrine is settled in this court that railroad companies may by contract exempt themselves from liabilities on account of the negligence of their servants, other than that which is gross or willful."

In the *Read* case, *supra*, the question arose where the plaintiff was riding on a free ticket, on the back of which was an indorsement to the effect that the person accepting the same assumes all risks of accident, and expressly agrees that the company shall not be liable, under any circumstances, for injury to the person or property of the passenger while using the ticket. It was held that the acceptance and use of the ticket made the indorsement thereon a special contract, but that the contract did not exempt the company from liability for injury caused by gross negligence.

In *Erie R'y Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451, we said: "The law has wisely, and for reasons that concern the public welfare, inhibited a common carrier of passengers or freight from contracting against its own negligence, or that of its servants and employees." See also *Toledo etc. R'y Co. v. Beggs*, 85 Ill. 80; 28 Am. Rep. 613.

In *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57, goods were shipped from Chicago to New York, worth in fact four hundred dollars, for which the company gave the shipper a receipt limiting its liability to fifty dollars in case of loss, of which the shipper had notice. It was there said: "Even if it should be conceded that the shipper must be considered as having assented to the terms of the bill of lading, we cannot hold the carrier excused from the exercise of reasonable and ordinary care. Courts have often had occa-

sion to express their regret that common carriers have been permitted, even by contract, to discharge themselves from the obligations imposed by the salutary rules of the common law. . . . It is very unreasonable in the carrier to say that it will in no event be liable beyond the sum of fifty dollars, in the absence of a special contract, though it may have received much more than that sum merely in the way of freight. . . . It would be very easy for them to require the shipper to specify the value of the merchandise, . . . making their charges in proportion to their liability. If the shipper should falsely state the value, he could not complain of being held to his own valuation. In order to prevent the carrier from releasing himself by contract from all liability, courts have laid down the rule above stated, that he cannot, even by contract, exempt himself from the exercise of reasonable care." And the same rule was laid down in *Boscovitz v. Adams Express Co.*, 93 Ill. 523; 34 Am. Rep. 191; and it was there held that the defendant was liable for the full value of the goods, if the loss was owing to negligence on the part of the railway company, who was the servant of the express company in the transportation of the goods.

We have thus given an epitome of cases decided by this court, to which others might be added, for the purpose of showing that we are committed to the doctrine that a common carrier cannot, even by express contract, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants or employees. Whatever may be the rule elsewhere, in this state the common carrier cannot contract for exemption from responsibility for a failure on its part, or that of its servants, to exercise ordinary care in the transaction of its business. If the carrier may by contract limit its liability for gross negligence or willful misfeasance to any extent, it may contract for total exemption. A contract for exemption from liability for its torts being void, as against public policy, it cannot shield itself as to any portion of the damages to person or property occasioned by its gross negligence or willful misconduct. As we have seen, it may protect itself against fraud by requiring the consignee to state the value of the thing shipped; but when it receives property for transportation it must exercise reasonable care until it reaches its place of destination, and will not be permitted to absolve itself from that responsibility.

By the strict rule of the common law, the carrier was liable for injuries resulting from causes beyond his control, and which were not the result of his act or the omission of his duty, the exception being, that he was not liable for injury or loss resulting from the act of God or the public enemy. Thus he must account for goods received for transportation, even though they be destroyed by fire without his fault. The rule has generally been so far relaxed that the carrier may, by special contract, exempt himself from this strict liability imposed by the common law, but the weight of authority, in our judgment, holds, as this court has uniformly held, that he may not exempt himself from liability for damages resulting from the gross negligence or willful misconduct of himself or of his servants. The law does not authorize common carriers to fix, arbitrarily, the value of goods delivered to them for transportation, and thereby limit their liability in case of loss. If a value should be fixed by the carrier, as before stated, and the contract of shipment was based thereon, the amount thus fixed would ordinarily determine the liability of the carrier. It would not, however, if untruthfully given in respect of property that the carrier had less opportunity to inspect and know the value of than the shipper, estop the carrier to show that the value was less than that fixed. It cannot be said that the clause in this contract, attempting to limit a recovery to one hundred dollars, amounts to an admission on the part of the shipper that the horse was worth no more than that sum. It was not made by the shipper, or intended as a statement of the value of the property, but was intended to fix a limit to the defendant's liability in case of loss; and if the contract had not been void, and had been knowingly entered into by the shipper or his authorized agent, it might have furnished the measure of recovery. If the injury to the property, and damage resulting, had been caused by any casualty against which the carrier might contract, the tender made by the defendant of the amounts named in the contract might have been a bar to a recovery, if it had been kept good. It is manifest from the foregoing that the tender was not effectual to defeat a recovery by the plaintiff.

As before said, we are not unmindful that a contrary rule has been announced by courts of the highest respectability, and among them the supreme court of the United States. Notwithstanding the great respect we entertain for the very learned and eminent tribunals which have thus held, we are

so strongly committed to the doctrine before announced, that we feel compelled to adhere to the rule so long and firmly established in this state; and notwithstanding the persuasive weight of the rulings of these eminent tribunals, and of the reasons given for their decisions, we are still satisfied that the rule laid down in this state is based upon sound reason and a wise public policy, and is also supported by the decided weight of authority.

In this case, the agent of appellant came to the agent of the appellee and others, and offered special inducements to ship their animals over appellant's road. No representation was made by appellee or his agent to induce the fixing of the value, either of the property shipped, or of the services of appellant for its carriage. It is insisted that the company had two classifications at the time, under which live-stock was shipped; that one limited the amount of recovery for a horse to one hundred dollars in case of loss, and that in the other class there was no limitation, but a higher freight rate was charged. At the time of this shipment no notice was given of any such classification. The appellant's agent received the property, charged what he saw proper, and made out the bill of lading without asking any questions as to the value of the property. The fact that such classification existed could in no way affect the plaintiff's right of recovery, unless notice thereof had been brought home in some way to the plaintiff or his agent. But it cannot avail, in any event, as against the right of recovery here. Plaintiff was guilty of no misconduct which would estop him from asserting his right to recover the value of his property, and it was unlawful for the railway carrier to contract for exemption from liability resulting from the gross negligence of its servants.

Some other minor points are made, which, however, have been disposed of by what has already been said, and no further discussion need be indulged.

We find no substantial error in the record, and the judgment of the appellate court will be affirmed.

Judgment affirmed.

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POWER OF COMMON CARRIER TO LIMIT THE AMOUNT OF HIS LIABILITY, IN THE EVENT OF LOSS, TO A SUM LESS THAN THE INJURY SUSTAINED. — Upon the question whether or not a common carrier can limit his liability for loss of or damage to goods delivered to him for transportation to a sum less than their actual value, when such loss or damage results from his negligence, or from the negligence of his agents or servants, the authorities

are conflicting. One line of authorities holds that where a contract of carriage, signed by the shipper, is made with a common carrier, agreeing on a valuation of the property to be carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations: *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331; *Hopkins v. Westcott*, 6 Blatchf. 64; *Muser v. Holland*, 17 Blatchf. 412; *Earnest v. Express Co.*, 1 Woods, 573; *The Hadji*, 18 Fed. Rep. 459; *The Lydian Monarch*, 23 Fed. Rep. 298; *South & N. Ala. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *South & N. Ala. R. R. Co. v. Henlein*, 56 Ala. 368; *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 38; *St. Louis etc. R'y Co. v. Lesser*, 46 Ark. 236; *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397; 1 Am. St. Rep. 104; *Brehme v. Adams Ex. Co.*, 25 Md. 328; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *Graves v. Lake Shore etc. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *Hill v. Boston etc. R. R. Co.*, 144 Mass. 284; *Brown v. Cunard S. S. Co.*, 147 Mass. 58; *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 538; *Brown v. Wabash etc. R'y Co.*, 18 Mo. App. 568; *Durgin v. American Ex. Co.*, Sup. Ct. N. H., July 25, 1890; *Duntley v. Boston etc. R. R. Co.*, Sup. Ct. N. H., July 26, 1890; *Belger v. Dinmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Magnin v. Dinmore*, 56 N. Y. 168; *Steers v. Liverpool etc. S. S. Co.*, 57 N. Y. 1; 15 Am. Rep. 453; *Magnin v. Dinmore*, 62 N. Y. 35; 20 Am. Rep. 442; *Magnin v. Dinmore*, 70 N. Y. 410; 26 Am. Rep. 608; *Richmond etc. R. R. Co. v. Payne*, 86 Va. 481; *Hutchinson on Carriers*, sec. 249.

The arguments in favor of this doctrine are ably presented by Mr. Justice Blatchford in delivering the opinion of the court in *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 340, in the following words: "As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed. . . . This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume. . . . The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from

the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract for transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

**DECISIONS HOLDING CONTRARY DOCTRINE.**—Another line of authorities, however, holds that the carrier cannot, even by express contract, restrict the measure of damages recoverable in case of loss or damage resulting from his negligence, or exempt himself from any part of his responsibility for his negligence. The ground upon which these cases proceed is, that if a common carrier cannot relieve himself from total liability for loss or damage resulting from his negligence, he cannot exempt himself from a part of his liability: *The City of Norwich*, 4 Ben. 271; *Galt v. Adams Ex. Co.*, McAr. & M. 124; 48 Am. Rep. 742; *Adams Ex. Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Boscovits v. Adams Ex. Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Chicago etc. R'y Co. v. Harmon*, 12 Ill. App. 54; *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104; *Kember v. Southern Ex. Co.*, 22 La. Ann. 158; 2 Am. Rep. 719; *Moulton v. St. Paul etc. R'y Co.*, 31 Minn. 85; 47 Am. Rep. 781; *Southern Ex. Co. v. Moon*, 39 Miss. 822; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017; *Southern Ex. Co. v. Seile*, 67 Miss. 609; *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Farnham v. Camden & A. R. R. Co.*, 55 Pa. St. 53; *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Weiler v. Pennsylvania R. R. Co.*, 134 Pa. St. 310; 19 Am. St. Rep. 700; *Coward v. East Tennessee etc. R. R. Co.*, 16 Lea, 225; 57 Am. Rep. 226; *Railway Co. v. Wynn*, 88 Tenn. 320; *Southern Pac. R'y Co. v. Maddox*, 75 Tex. 300; *Black v. Goodrich T. Co.*, 55 Wis. 319; 42 Am. Rep. 713. Campbell, C. J., in delivering the opinion of the court in *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1025, said: "If in fault, the carrier should make compensation by paying the damage done, and should not be allowed to stipulate in advance for a diminished liability below the real loss sustained by the fault which creates liability. To allow that would defeat the politic rule against stipulating for exemption from the consequences of negligence or misconduct." Dickinson, J., delivering the opinion of the court in *Moulton v. St. Paul etc. R'y Co.*, 31 Minn. 85, 47 Am. Rep. 781, said: "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence stand also in the way of any arbitrary preadjustment of the measure of damages, where the carrier is partially relieved from such liability. It would indeed be absurd to say that the requirement of the law as to such responsibility of the carrier is absolute, and cannot be laid aside even by the agreement of the parties, but that one half or three fourths of this burden which the law compels the carrier to bear may be laid aside, by means of a contract limiting the recovery of damages to one half or one fourth of the known value of the property. This would be mere evasion, which would not be tolerated." And James, J., delivering the opinion of the court in *Galt v. Adams Ex. Co.*, McAr. & M. 124, 48 Am. Rep. 742, said: "We hold, then,

that the principle of law which for considerations of public welfare forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper's perfect consent cannot wholly relieve the carrier, is, that the subject which he undertakes to regulate by contract, is not his own, but a public right. . . . No single person is allowed to agree that such a carrier, or that any carrier who owes a public duty, may with impunity be negligent in his case, for the reason that the carrier is thereby invited to omit his duty in other cases, and thus to injure the whole community. Can it be possible that these considerations, on which the rule against total exemption is based, lose their force when the carrier is invited to violate his public duty by an agreement that he may violate it at half price? The principle of the rule is, that any agreement which operates to interfere with the public right touching the care and good faith of common carriers is an agreement against public policy and welfare, and is therefore void; and as an agreement that his negligence shall be cheap must operate in this way, it necessarily falls within that principle."

It must be admitted that the reasoning of these decisions is very forcible, if not conclusive, especially in those states where common carriers are not permitted by contract to wholly relieve themselves from liability for loss and damage resulting from their own negligence, or that of their agents and servants.

**TENDENCY OF RECENT DECISIONS TO MODIFY RULE.** — There seems to be a tendency on the part of the courts of some states, even of those states that have adopted the rule of the supreme court of the United States laid down in the *Hart* case, in their recent decisions to somewhat modify the rule. Thus in a recent case in Alabama (*Louisville & N. R. R. Co. v. Sherrod*, 84 Ala. 178), Clopton, J., delivering the opinion of the court, said: "There is, however, a qualification of the rule. A common carrier exercises a public employment, and is bound to receive and carry, at reasonable rates, any goods offered, and the means of transportation are greatly monopolized. Under these circumstances, a carrier will not be permitted to take advantage of his position to coerce the shipper to agree to a limited value by a threatened charge of a high and unreasonable rate if such agreement is not made. There must be no imposition, coercion, or undue advantage. Neither can the carrier stipulate for immunity from liability for fraud or for intentional or reckless negligence. Such special contracts may be avoided by willful or wanton negligence in disregard of the rights of the shipper." In that case it was held that the shipper was free to contract or not, as he chose, and that he had contracted in consideration of a reduced rate, and the contract was held to be binding upon him. In the earlier case, in the same state, of *Alabama etc. R. R. Co. v. Little*, 71 Ala. 611, 615, Brickell, C. J., delivering the opinion of the court, said: "The carrier cannot stipulate for an absolute, unqualified exemption from all liability, nor can he stipulate that he will answer, in any and all events, only for a sum less than the value of the goods because in consideration of reduced rates of freight the shipper may assent to it. For immunity from liability for his own frauds, no bailee can stipulate." In that case the shipper had stipulated that in consideration of reduced rates, the loss, if any should occur, should be adjusted at an agreed valuation. The goods were lost, presumably through the negli-



gence of the carrier, and it was held that the shipper could recover their full value.

So, also, in a recent case in Missouri (*McFadden v. Missouri Pacific R'y Co.*, 92 Mo. 343, 1 Am. St. Rep. 721), it was decided that where a bill of lading falsely recites that a special and reduced rate of freight is given, and the shipper, in consideration therefor, agrees to accept a limited valuation for the property transported, in case of its loss through the negligence of the carrier, the contract is not binding on the shipper, and the stipulation as to limited valuation is void, as releasing the carrier from his liability for negligence. Ray, J., delivering the opinion of the court in that case, referring to the Hart case, said: "We cannot regard it as controlling authority in a case where the evidence clearly shows absence of reduced or lower rate, or any graduation of compensation to the valuation. . . . It would, we think, be no less unfair, unreasonable, and unjust that the carrier, without any sacrifice of his interest or lawful demands, or diminution of his lawful charges, should secure, without any consideration therefor, such important advantages and release of liabilities to which he would otherwise be subjected under the law."

In the case of *Rosenfeld v. Peoria etc. R'y Co.*, 103 Ind. 121, 53 Am. Rep. 500, it was held that if, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract and a valuable consideration, the carrier places a value upon the goods received for carriage, that will not bind the shipper, but he will in such case have the right to recover the full value of the goods lost by the carrier. And in the recent case of *Adams Ex. Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, it was decided that a contract limiting the damages recoverable of a carrier will not control, where negligence is shown, and there is no proof that a lower rate of freight was given on account of the limitation placed upon the value of the property.

It is not easy to reconcile all the cases which maintain the doctrine that a carrier has power to limit the amount of his liability for loss or damage, even in case of negligence on his part, nor always to reconcile the decisions on this point made by the same court; but an examination of the recent decisions seems to indicate a tendency to restrict rather than to enlarge such power. Even in New York, where the carrier has always been allowed by express contract to exempt himself from all liability, such contracts are strictly construed against the carrier, the rule adopted being that "the words are to be taken most strongly against the party whose language they are, and who is in an advantageous position in fixing the terms of the contract": *Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300; *Magnin v. Diameore*, 56 N. Y. 168. See also *Oppenheimer v. United States Ex. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Rosenfeld v. Peoria etc. R'y Co.*, 103 Ind. 121; 53 Am. Rep. 500; *Black v. Goodrich T. Co.*, 55 Wis. 319; 42 Am. Rep. 713.

**FRAUD OF SHIPPER WILL DEFEAT HIS RIGHT TO RECOVER.** — All the authorities agree that if a shipper, upon inquiry being made of him respecting the value of the goods, deceives the carrier, in order to get reduced rates of transportation, he will be estopped by his fraud from claiming any greater amount after loss: *McCance v. London etc. R'y Co.*, 7 Hurl. & N. 477; *Hayes v. Wells, Fargo, & Co.*, 23 Cal. 185; 83 Am. Dec. 89; *Chicago etc. R. R. Co. v. Shea*, 66 Ill. 471; *Rosenfeld v. Peoria etc. R'y Co.*, 103 Ind. 121; 53 Am. Rep. 500. A failure, however, on the part of the shipper to disclose the value of the property, when no inquiry is made of him by the carrier, is not in itself a fraud upon the carrier: *Railroad Co. v. Fratoff*, 100 U. S. 24;

*Southern Ry. Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140. But see *Magnin v. Dinmore*, 62 N. Y. 35; 20 Am. Rep. 442; *Magnin v. Dinmore*, 70 N. Y. 410; 26 Am. Rep. 608.

**POWER OF CARRIER TO LIMIT HIS LIABILITY FOR LOSS RESULTING FROM CAUSES OTHER THAN HIS NEGLIGENCE.** — All the authorities, both in England and in this country, are agreed that a common carrier may, by express contract, limit his common-law liability for all loss or damage resulting from causes other than his own negligence or that of his agents or servants. For a discussion of this question, see the note to *Cole v. Goodwin*, 22 Am. Dec. 497, and the numerous cases there collected.

## CITY OF SANDWICH v. DOLAN.

[133 ILLINOIS, 177.]

**PERSON PASSING OVER DEFECTIVE SIDEWALK BOUND TO EXERCISE ORDINARY CARE TO AVOID INJURY.** — In an action against a city to recover damages for personal injuries resulting from defects in its sidewalks, the plaintiff cannot recover, however negligent the defendant may have been in failing to keep its sidewalks in repair, unless the plaintiff, at the time of the accident, was exercising ordinary care to avoid injury; and whether or not he was exercising such care is a question of fact to be determined by the jury.

**SELECTION OF DANGEROUS ROUTE, WHETHER JUSTIFIABLE OR NOT, TO BE LEFT TO JURY.** — If there are two routes from a party's residence to his place of destination, one dangerous and the other entirely safe, and he sees fit to select the dangerous one, it cannot be determined as a matter of law that he was justified in making such selection, but the question must be left to the jury. While he may not be obliged to take a less convenient route, which is safe, his failure to do so will present a question of fact whether, in the selection of a route known to be dangerous, he was in the exercise of ordinary care for his safety.

**INSTRUCTION MISLEADING AND ERRONEOUS WHEN.** — In an action against a city to recover damages for personal injuries resulting from a defective sidewalk, an instruction to the jury that if they believed from the evidence that the most direct route for the plaintiff in going to a certain place and returning to his home in the city was over the defective sidewalk, then the fact, if shown, that such sidewalk over which the plaintiff passed was defective, and had been in a defective condition for some months previous to the injury, would not oblige the plaintiff to take another less convenient sidewalk, is misleading and erroneous. Whether it was obligatory on the plaintiff to travel over one sidewalk or the other is not a question for the court to determine as a matter of law.

**ACTION for personal injuries.** The opinion states the case.

*Carnes and Denton*, for the appellant.

*John L. Pratt and Samuel Alschuler*, for the appellee.

**CRAIG, J.** This was an action brought by Belle F. Dolan against the city of Sandwich to recover for an injury received

from a fall on a defective sidewalk on the night of December 25, 1887. The plaintiff resided on the south side of Third Street, and the accident occurred about nine o'clock in the evening, as plaintiff was going from the Congregational church to her residence. The sidewalk over which she was passing was the direct route from the church to her residence, and where the accident occurred, in front of what is known as the Kinney lot, it had been out of repair and in an unsafe and dangerous condition for several months. The plaintiff had been in the habit of passing over the defective walk for some months before the accident, — as she testified, from four to six times a week, — and the dangerous condition of the walk was known to her at the time.

On the trial, one witness, who resided on the same side of the street where plaintiff resided, testified, on his cross-examination, in substance, as follows: "I had avoided this walk during the fall and summer before Christmas. My reason was, that there was danger from loose boards flying up. It is the nearest way for us to go to church for evening services, when we pass into the lecture-room, but in the morning I usually went on the other side of the street."

Doubtless for the purpose of removing from the minds of the jury the impression which might be created by this evidence, that any legal duty rested upon the plaintiff of taking some other route to the church which might be safer or less dangerous, or for the purpose of removing from their minds the fact that plaintiff did not exercise ordinary care, counsel for plaintiff prepared, and the court gave to the jury, the following instruction: "10. If the jury believe from the evidence that the most direct route for the plaintiff, in going to and from the Congregational church, in the city of Sandwich, to her home in said city, was over the sidewalk along the south side of Third Street, in said city, then the fact, if shown by the evidence, that such sidewalk on said street over which plaintiff passed was defective, and had been in a defective condition for some months previous to the alleged injury, would not oblige her to take another less convenient sidewalk."

The giving of this instruction is relied upon as error. The court, in instruction No. 8, directed the jury that the question of whether or not the plaintiff was exercising ordinary care to avoid injury in passing over the sidewalk when and where the alleged injury took place is a question of fact, to be determined by the jury from all the evidence. This charge to

the jury was clearly correct. The plaintiff could not recover, however negligent the defendant may have been in failing to keep its sidewalks in proper repair, unless the plaintiff, at the time of the accident, was exercising ordinary care to avoid injury; and whether plaintiff was in the exercise of ordinary care, as has been often held, is a question of fact. Had the question of what degree of care was required of plaintiff been left where this instruction placed the question, no fault could be found with the instruction; but it is claimed that No. 10 invades the province of the jury, and in substance directs them that the plaintiff might expose herself to known danger with impunity, provided she was traveling in the most direct route to her home. As has been said before, it was a question for the jury to determine, whether the plaintiff, at the time she received the injury, was in the exercise of proper care. If there were two routes from plaintiff's residence to the church, one dangerous and the other entirely safe, and in the selection of a route plaintiff saw proper to pass over the dangerous one, it could not be determined, as a matter of law, that plaintiff was justified in selecting the dangerous route, but the question ought to have been left to the jury. As an abstract question, it may be that plaintiff was not obliged, as declared in the instruction, to take another less convenient sidewalk; but if she failed to do so, it would be a question of fact whether, in the selection of a route known to be dangerous, she was in the exercise of ordinary care.

When this court had the power to review questions of fact as well as questions of law, in *City of Centralia v. Krouse*, 64 Ill. 21, where a sidewalk had been damaged by fire, and become dangerous to travel upon, it was held to be the duty of the public to pass on the other side of the street; and where a person was injured in passing over the dangerous walk, knowing its condition, it was held he could not recover. In *Lovenguth v. City of Bloomington*, 71 Ill. 238, following the rule announced in the case last cited, it was held that an instruction to the effect that the plaintiff was not bound to travel on another sidewalk than the one on which he received the injury complained of, even though he knew that the one on which he was injured was out of repair, was properly refused. It is there said: "Had the court given this instruction as it was prepared, it would have been, in effect, telling the jury the plaintiff's son might properly pass over the sidewalk, however dangerous it might be, with full knowledge on his part

of its dangerous character. This is not the law." See also *Brucker v. Town of Covington*, 69 Ind. 33; 35 Am. Rep. 202; *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580; Dillon on Municipal Corporations, 3d ed., sec. 1007; and *Wilson v. City of Charlestown*, 8 Allen, 137; 85 Am. Dec. 693,—where the same doctrine is announced. In the case last cited, it is said: "The fact that the street in front of the sidewalk, and the sidewalk on the opposite side of the street, were in such condition that they could have been used safely and conveniently, which was shown, tended to prove a want of care on the part of the female plaintiff. It is settled that if a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity: *Horton v. Ipswich*, 12 Cush. 488." In Dillon on Municipal Corporations, sec. 1007, it is said that the party injured must be free from contributory negligence; i. e., if he knew of the defect or obstruction, and ought reasonably to have avoided it by going outside or around it, and did not, he cannot recover.

Whether it was obligatory on plaintiff to travel over one walk or the other was a question which it was not the province of the court to determine as a matter of law, and we think the instruction was calculated to mislead the jury.

*City of Aurora v. Hillman*, 90 Ill. 61, has been cited as sustaining the instruction. It is true that an instruction like the one in question was sustained in that case; but there the party injured was not aware of the dangerous condition of the walk. Had the walk been known to be dangerous, as was the case here, doubtless a different rule would have been announced in regard to the instruction. This is manifest from what is there said, as follows: "In *City of Centralia v. Krouse*, 64 Ill. 20, the sidewalk was positively dangerous and practically impassable; and Krouse had full knowledge of this, and it was culpable negligence in him to undertake to pass over it. The sidewalk in this case was not of this character, and, although out of repair, had been passed over daily, not only by appellee, but by all other pedestrians who found it convenient so to do. . . . The evidence does not show appellee, who was a shoemaker, knew the stringers were rotten and would not hold nails, and he testified on the trial he did not know the plank Moreau stepped on was loose, and that he had passed there that morning, and it was not loose then."

*City of Bloomington v. Chamberlain*, 104 Ill. 268, has also been cited by the plaintiff, but there is nothing in that case to sustain the instruction involved here. It was there held that knowledge of the condition of the walk is one of the circumstances to be considered in determining whether the plaintiff exercised ordinary care. It was also held that it cannot be laid down as a legal proposition that a person traveling on the sidewalk of a city is bound to go out into the street and pass around the walk, although he knows it to be defective, especially when the defect is merely loose boards, and the walk is not palpably dangerous.

We think the instruction calculated to mislead the jury, and thus erroneous.

The judgments of the appellate and circuit courts will be reversed, and the cause will be remanded to the circuit court.

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**DEFECTIVE SIDEWALKS — NEGLIGENCE — PEDESTRIANS.** — For the rights and duties of pedestrians on public streets or highways, see *Stringer v. Frost*, 116 Ind. 477; 9 Am. St. Rep. 875, and note 878-880; *Kelly v. Blackstone*, 147 Mass. 448; 9 Am. St. Rep. 730, and note; *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Maus v. Springfield*, 101 Mo. 613; 20 Am. St. Rep. 634. A pedestrian knowing the dangerous condition of a street or highway is not necessarily negligent in persisting in traveling thereupon: *Henry County etc. Co. v. Jackson*, 86 Ind. 111; 44 Am. Rep. 274, and note 276-279; *Fort Wayne v. Breese*, 123 Ind. 581; *Columbus v. Strassner*, 124 Ind. 482; *Poseyville v. Lewis*, 126 Ind. 80; as a question of such contributory negligence is always to be determined by the jury: *Forker v. Sandy Lake Borough*, 130 Pa. St. 123. The pedestrian must use ordinary care to avoid injury from defects known to him: *Horrigan v. Clarksburg*, 150 Mass. 218; *New Albany v. McCulloch*, 127 Ind. 500; *Robb v. Connellsville*, 137 Pa. St. 42.

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## SANFORD v. KANE.

[123 ILLINOIS, 193.]

**POWER OF SALE IN MORTGAGE, WHO MAY EXECUTE.** — A power of sale given to a mortgagee can be executed only by him, if there has been no transfer of the debt so as to pass the legal title thereto; but if the debt has been legally assigned, the assignee is the one authorized to make the sale.

**ASSIGNMENT OF MORTGAGE OF REAL ESTATE DOES NOT TRANSFER LEGAL OWNERSHIP.** — A mortgage of real estate is not negotiable or commercial paper, either at common law or under the Illinois statutes, and an assignment of it does not convey or transfer the legal ownership. The right acquired by such an assignment is an equitable right only, and a sale made by the assignee, under a power of sale given by the mortgage to the mortgagee, is void.

**LOAN BY BROKER OF HIS OWN MONEY USURIOUS WHEN.** — A broker who in good faith negotiates loans from others may charge the borrower a commission without rendering the loan, at full rate of interest, usurious; but he cannot charge a commission when he himself advances the money loaned, for the purpose of afterwards selling the security given to him. To sanction such a transaction would be to uphold a palpable evasion of the statute prohibiting usury.

**WIFE JOINING HUSBAND IN WARRANTY DEED OF HIS LAND NOT ESTOPPED FROM ASSERTING AFTER-ACQUIRED TITLE.** — A married woman who unites with her husband in a warranty deed of his land, merely for the purpose of enabling him to pass the title free from her inchoate right of dower, is not estopped from asserting in her own favor an after-acquired title to such land.

**BILL** to set aside sale of land, and to redeem. The opinion states the case.

*B. C. Cook*, for the plaintiffs in error.

*Robert Doyle*, for the defendant in error.

**SHOPE, C. J.** This bill was filed to set aside the sale of land made under a power in the mortgage given by Morris Kane, joined by his wife, Cassa Kane, October 15, 1875, to E. Sanford, and to redeem from said mortgage. The mortgage secures the payment of five hundred dollars three years after date, with interest at ten per cent, payable semi-annually. There was executed, contemporaneously with the mortgage, by Kane and wife, a note for five hundred dollars, signed by Kane and wife, payable to Sanford, and bearing interest as mentioned in the mortgage. While the mortgage does not mention a note, the proof shows that they were parts of the same transaction, and given to secure the same loan, the note being required as further security, should there be any deficiency on a sale under the mortgage. The mortgage provided that in case of default in the payment of the debt, or any part thereof, "the said grantee, his heirs or assigns," may sell the mortgaged premises, etc., "and in his name or in my name, or as my attorney in fact," make a deed to the purchaser or purchasers. September 15, 1876, Sanford indorsed the note to one Edgar G. Whittlesey, and on the same day made to Whittlesey a separate written instrument, purporting to assign and transfer the mortgage, and also placed his name in blank upon the mortgage. September 2, 1879, Whittlesey made a similar written assignment of the mortgage to George Wilkinson, but no assignment of the note, and delivered the note and mortgage to him. The interest was paid to July 20, 1878, the maturity of the note. Default was made in the

payment of principal, and on October 16, 1879, Wilkinson, claiming to be the assignee of the mortgage debt, sold the land under the power contained in the mortgage, having previously given notice, according to the terms of the mortgage, of the sale to take place on that day, at two o'clock, P. M. Just before the hour of sale, Morris Kane and Wilkinson met, and the proof tends to show that it was agreed that the sale should be postponed until four o'clock, to enable Kane to procure the money to pay off the debt; but during his absence, and before the hour of postponement had arrived, Wilkinson sold the property to Sanford for three hundred dollars, and refused to do anything further, referring Kane to Sanford.

The first and one of the principal questions is, whether the power of sale was executed by a person authorized by the mortgage to execute the same. If it was, the sale must stand, in the absence of other grounds of objection; but if made by one not authorized by the mortgage, then it was void, and no title passed by the sale and deed.

The power of sale was given by the mortgage to the mortgagee, or to his heirs or assigns. If there was no transfer of the debt, so as to pass the legal title thereto, the power could be executed only by the mortgagee; but if the debt was legally assigned, the assignee was the one authorized to make the sale. In *Hamilton v. Lubukee*, 51 Ill. 415, the mortgage contained a power of sale, given to "the mortgagee, his heirs or assigns," in case of default. The notes in that case were never assigned, but were sold and delivered to Eisendrath & Co., but the mortgage was assigned by an indorsement made thereon. The court said: "The mortgage not being an assignable instrument, either at common law or under the statute, the power to sell remained with the mortgagee." And the court referred to *Olds v. Cummings*, 31 Ill. 188, and *Pardee v. Linsley*, 31 Ill. 174; 83 Am. Dec. 219. See also *Strother v. Law*, 54 Ill. 413; *Mason v. Ainsworth*, 58 Ill. 163; *Dempster v. West*, 69 Ill. 618; *Bush v. Sherman*, 80 Ill. 160; *Union Mutual Life Ins. Co. v. Slee*, 123 Ill. 93; *Delano v. Bennett*, 90 Ill. 533.

If the note was secured by the mortgage, its legal holder would be authorized to execute the power of sale. Whittlesey, being the assignee of the note, could alone make the sale, if the note was secured by the mortgage, and the sale by Wilkinson, the note not having been indorsed to him, was unauthorized and void. A mortgage of real estate is not negotiable or commercial paper, either at common law or under our statutes,



and an assignment of it does not convey or transfer the legal ownership. The right acquired is an equitable right only, so that in any event Wilkinson was not the legal assignee of Sanford. As we have seen, the legal title to the note was in Whittlesey, by its indorsement to him by the payee, Sanford, and not in Wilkinson. The mortgage being a mere chose in action, and not assignable, the right to make the sale, if the mortgage is to be treated independently of the note, would remain in the mortgagee. The sale, having been made by Wilkinson, was therefore void, and there has been no valid foreclosure of the equity of redemption. It follows, that the mortgagors have a right to redeem from the mortgage by the payment of the sum legally due thereon. It will be unnecessary to consider, in this view, whether Wilkinson was guilty of such conduct at the sale as would equitably entitle the complainant below to the relief sought by her bill.

The right to redeem from the mortgage being established, the question of usury presented by the pleadings becomes material. It is conceded that Kane received only \$475 of the \$500 for which the note and mortgage were given. Sanford contends that the twenty-five dollars retained by him out of the loan was not usury, but was commission paid him by Kane for procuring the loan. Undoubtedly, a broker, negotiating loans in good faith from others, may charge the borrower commission without rendering the loan, at full rate of legal interest, usurious: *Hoyt v. Pawtucket Institution for Savings*, 110 Ill. 392; *Phillips v. Roberts*, 90 Ill. 492; *Boylston v. Bain*, 90 Ill. 288; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69.

The question here made is one of fact. Was the loan made by Sanford or by Whittlesey? Looking at the papers executed by the Kanes, and the acts of the parties, the conclusion that it was in fact made by Sanford seems irresistible. He took the note and mortgage to himself, and furnished the money by his draft, long before the assignment to Whittlesey. If Sanford was loaning money for Whittlesey, or if the latter had agreed to make the loan, the usual course would have been to have taken the securities directly to him. Sanford, it appears, controlled the securities, and finally became the purchaser of the property. Without entering into detail, we are not satisfied that the money in fact loaned belonged to Whittlesey, or to any one other than Sanford. The transaction was evidently one, not infrequent, where a loan is taken

at a high rate of interest, and subsequently sold to investors of money. If Sanford in fact made the loan, he could not divest the transaction of the taint of usury by afterwards selling the note and mortgage to Whittlesey. To sanction such a transaction would be to uphold a palpable evasion of the statute. We think the court below properly held that the evidence shows the transaction to be usurious. The defendant in error, having sought relief in a court of equity, was bound to submit to equitable terms, and the court therefore very properly decreed that she should pay six per cent interest per annum on the loan as a condition of her right to redeem.

The point is made that Cassa Kane, when she filed this bill, October 15, 1881, had no interest in the land, and therefore had no standing in a court of equity to set aside the sale and redeem from the mortgage. The facts upon which the contention is based are substantially as follows: Morris Kane was the owner of the land, said Cassa having only an inchoate right of dower. After their mortgage to Sanford, February 21, 1876, Morris Kane, his wife not joining in the deed, conveyed the land to his father, John Kane. No conditions were inserted in this deed, and the grantee assumed no obligations in respect to the Sanford mortgage. On March 27, 1879 (the title to the land then being in John Kane), Morris, and Cassa Kane, his wife, by warranty deed, purported to convey the land to one John C. Parr, subject to the Sanford mortgage. It is clear that at that time Cassa Kane had no interest in the land, other than perhaps her inchoate right of dower, and not that interest as against the Sanford mortgage. The title not being in either Morris or Cassa Kane, Parr took nothing by his deed. It is unnecessary for us to determine here what obligation he assumed in respect of this mortgage, or what would have been the effect of his deed in a suit by Sanford, or the holder of this mortgage, to fix liability upon him under said deed. On the 3d of October, 1881, John Kane, the holder of the equity of redemption, and having the right to redeem from the Sanford mortgage, conveyed all his estate, right, title, and interest in this property to Cassa Kane, and it is by virtue of the title thus acquired that she claims the right to file this bill. Her right to do so would not be disputed if she had not united with her husband in the warranty deed to Parr. It is contended, however, by plaintiff in error, that whatever title she acquired by the deed from John Kane

inured to the benefit of her former grantee, Parr, and that she is estopped by her covenants of warranty from disputing that the title is vested in him under her deed.

At common law, a married woman was not estopped by the covenants in her deed, or in those of her husband in which she joined: 2 Devlin on Deeds, sec. 1287; Bigelow on Estoppel, 3d ed., 277; *Strawn v. Strawn*, 50 Ill. 33; *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22. It is claimed that section 6, chapter 68, of the statute relating to husband and wife, has changed this rule of the common law. That section reads: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried; but, except with the consent of her husband, she may not enter into or carry on any partnership business," etc. The question is directly presented, whether this change in the rule of the common law subjects the defendant in error to estoppel by the covenants in her deed to Parr. If it does, then the title subsequently acquired will inure to the benefit of her grantee holding her deed containing covenants of warranty.

The statutes enlarging the rights and obligations of married women are of comparatively recent date, and we have been unable to find any considerable authority bearing upon the question. By the statute of Massachusetts (c. 108, sec. 63), every married woman is made capable of selling and conveying her separate real and personal property, entering into contracts in respect to the same, and of suing and being sued in respect of all matters relating thereto, in the same manner as if she were sole. In *Knight v. Thayer*, 125 Mass. 25, an analogous question was presented, and the court said: "By the common law of Massachusetts, the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or of estoppel, because she was incapable of binding herself by warranty, or by agreement to convey her real estate." After giving the substance of the statute, the court further says: "Any conveyance or contract executed by a married woman in accordance with the power thus conferred is binding upon and may be enforced against her to the same extent as if she was unmarried." The court then held that a warranty deed of a married woman of her land would pass to her grantees a subsequently acquired title.

Under our statute, married women may make contracts

that will be enforced against them, but their conveyances, in order to bind them in respect of their real estate, must have for their object the disposition, in some form, of their lands, or of some right or interest relating to their lands. Where a married woman joins with her husband in his deed for the sole purpose of enabling him to pass the title free from her inchoate right of dower, such deed cannot be said to be her contract for any other purpose than to release her dower. A court of equity, when its power is invoked, will look beyond the mere form and into the substance of the transaction, and give effect to the contracts of parties according to the true intent and meaning which the parties themselves understood and attached to them at the time they were made. It cannot be said, at least in equity, that by signing and acknowledging the deed of her husband for the sole purpose of releasing her dower, she makes the deed her own, and subjects her to liability on the covenants of title. The deed may operate as a conveyance, release, or acquittance only, or it may create a contract obligation, as where the party covenants in respect of the estate granted.

In *Strawn v. Strawn*, 50 Ill. 33, Strawn and his wife, by their deed, conveyed land of the husband to their daughter and the heirs of her body forever, and the grantors covenanted for themselves, their heirs and assigns, to forever warrant and defend the same. The usual acknowledgment of its execution was taken, in which the wife formally relinquished her dower. The daughter died without issue. After the husband's death the wife claimed the land by right of survivorship. The fact that Mrs. Strawn joined in the deed was claimed to be evidence establishing the joint ownership in herself and husband. It was also claimed that the heirs of Jacob Strawn, the grantor, were estopped by the covenants in the deed. This court, however, held that the wife joined in the execution of the deed, in compliance with the statute, in order to release her dower, and for that purpose only, and that the covenants therein could not have the effect insisted upon. It is there said: "But is it true that by force of the act of 1861 appellant (the wife) could be bound by the covenants in this deed? Had it been her own land, and her husband had united in a conveyance of it containing covenants, she could not be held responsible upon them any further than that they should be held to convey from her and her heirs her right and interest in the land,—and this immunity is not de-

stroyed by the act of 1861. If that act makes her responsible on covenants contained in a deed she may execute for her own land, how it can be said to make her liable on covenants in a deed for land to which she set up no title, and joined in its execution for the sole and only purpose of releasing any future right she might have as a wife surviving her husband, the owner of the fee, we fail to perceive."

We have not failed to note the difference between the rights of married women under the statutes in force when these deeds were made, and those given by the act of 1861. The foregoing case aptly illustrates the view that will be taken in the construction of deeds of married women.

Before proceeding further, it should be said that the deed to Parr did not purport to be that of the wife, Cassa Kane. She had, and claimed to have, no title or interest in the land, other than her inchoate dower. She had nothing that could be conveyed by deed. The conveyance act provides the mode by which she may relinquish her dower "in any of the real estate of her husband, or in any real estate," by joining him in a deed. And if she join with her husband in a conveyance of his land merely for the purpose of releasing her dower, she will not, in equity, be held liable upon the covenants of the deed. It should also be observed that Parr is making no claim to this land. He does not claim that the title was vested in him by the deed from John Kane to Cassa Kane. Plaintiff in error does not claim by, through, or under Parr, and we are unable to perceive upon what principle he can be permitted to insist upon the estoppel. There is no proof that Parr paid anything for the deed to himself, or has at any time attempted, or is now attempting, to assert any title thereunder.

We are of opinion that Mrs. Kane, defendant in error, is not estopped by the deed to Parr from asserting title under the deed from John Kane to herself. We are of opinion that, under the facts here shown, she having joined in making the deed to Parr for the single purpose of relinquishing her dower right, if she had any, in the land, the title subsequently acquired by her would not inure to the grantee in such deed.

We find in this record no substantial error, and the decree is therefore affirmed.

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**MORTGAGES — POWER OF SALE.** — A power of sale contained in a mortgage must be executed by the mortgagee, but where the note secured by the mortgage containing the power has been assigned, the power of sale vests in

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the assignee: *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562, and note; *Nichols v. Otto*, 132 Ill. 91. A mortgage containing a power of sale authorizing the mortgagee to sell in case of default in the conditions of the mortgage is a complete and valid common-law power: *Webb v. Lewis*, 45 Minn. 285. The assignee of a mortgagee under a mortgage containing a power of sale cannot sell and convey title to the purchaser, unless the assignment was sufficient to convey an interest to the assignee: *Dameron v. Estridge*, 104 N. C. 621.

**MORTGAGES — RIGHTS OF AN ASSIGNEE OF.** — The assignee of a mortgage takes it subject to all equities in favor of the mortgagor: *Horstman v. Gerker*, 49 Pa. St. 282; 88 Am. Dec. 501, and note, in which the assignment of mortgages is thoroughly discussed. The assignee of a mortgage takes only the rights of the mortgagee: *Nichols v. Lee*, 10 Mich. 526; 82 Am. Dec. 57, and note. The assignment, by a mortgagee, of his interest in the mortgage, without proper words of grant, will convey only an equitable interest in the land: *Lanigan v. Sweany*, 53 Ark. 185; *Bailey v. Winn*, 101 Mo. 649.

**USURY — COMMISSIONS FOR LOANS.** — A contract to pay as commissions to a commission merchant two per cent in addition to legal interest, for moneys advanced, is usurious: *Stark v. Sperry*, 6 Lea, 411; 40 Am. Rep. 47; *Thompson v. Ingram*, 51 Ark. 546; *Oallaway v. Butler*, 79 Ga. 356; *contra*, *Baird v. Millwood*, 51 Ark. 549; *Trimble v. Thorson*, 80 Iowa, 246.

**HUSBAND AND WIFE — ESTOPPEL.** — A married woman who joins her husband in a warranty deed of land, in which she has simply a dower interest, is not estopped to set up a subsequent title acquired by her: *Childs v. Mo-Cheaney*, 20 Iowa, 431; 89 Am. Dec. 545, and note; *Griffin v. Sheffield*, 38 Miss. 359; 77 Am. Dec. 646, and note; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593, and note; *Jefferson v. Edrington*, 53 Ark. 545; *Jackson v. Torrence*, 83 Cal. 521; *Heinmiller v. Huthway*, 60 Mich. 391.

## ALLEMANIA FIRE INSURANCE COMPANY v. PECK.

[123 ILLINOIS, 220.]

**DELAY IN BRINGING SUIT ON POLICY OF INSURANCE, COMPANY ESTOPPED FROM SETTING UP, WHEN.** — If the delay of the insured to bring suit upon a policy of insurance within the time limited in such policy is the result of the company's having held out hopes of an amicable adjustment without suit, the company will, when sued, be estopped from setting up the limitation provided by the policy. And the plaintiff will not, in order to show a waiver by the defendant of the limitation clause in the policy, be bound to prove that his delay in bringing suit was at the special instance and request of the defendant.

**UNNECESSARY ALLEGATION IN PLEADING MAY BE DISREGARDED.** — Where a replication presents a sufficient reply to the plea of the defendant, and also contains a further allegation which is unnecessary, such allegation may be disregarded as mere surplusage.

**CONDITION IN INSURANCE POLICY REQUIRING NOTICE OF SALE NOT APPLICABLE TO SALES TO PARTNERS OR JOINT OWNERS.** — A condition in a policy of insurance requiring notice to be given to the company of any contract to sell the property insured must be held to apply only to contracts of sale between the insured and third parties, and can have

no application to contracts between the insured themselves for the sale or transfer of their respective interests as partners or joint owners, so long, at least, as the party selling retains an insurable interest in the property insured.

**CONDITION IN INSURANCE POLICY AGAINST CHANGE OF POSSESSION CAN ONLY REFER TO CHANGE DURING TERM OF POLICY.** — A condition in a policy of insurance that it should become void by any change in the possession of the property insured must be held to refer to some change in the possession during the term of the policy, and not to one made before the application for the policy.

**CLAUSE IN POLICY OF INSURANCE REFERRING TO PAPER NOT SHOWN TO EXIST NUGATORY WHEN.** — Where conditions in a policy of insurance relating to misrepresentations or concealments as to the situation or occupancy of the property insured therein are in a clause which refers to an application, plan, survey, or description, and assumes to make such paper a part of the policy and a warranty by the insured, but the record fails to disclose the existence of any such paper, the clause which refers to it, and attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of misstatements or omissions therein, must be regarded as inapplicable to the facts in the case, and therefore nugatory.

**ASSUMPSIT.** The facts appear from the opinion.

*Myron H. Beach*, for the appellant.

*Flower, Smith, and Musgrave*, for the appellees.

**BAILEY, J.** The record contains evidence tending to support the plaintiffs' replication to the defendant's plea setting up the limitation clause in the policy, but whether said evidence is sufficient to sustain the verdict of the jury upon that issue is purely a question of fact, as to which the judgment of the appellate court is conclusive. We must therefore assume that said replication, or at least enough of its averments to constitute a sufficient answer to said plea, were duly proved. We have only to consider whether any error of law was committed in the mode in which that question was submitted to the jury.

On this question the court instructed the jury, at the instance of the plaintiffs, that "even though they should find, from the evidence, that this action was not brought within the six-months limitation named in the policy, yet if they still further find from the evidence that from the date of the fire up to the time the suit was commenced, there were pending negotiations between the plaintiffs and the defendant company or its agents, in reference to the settlement or adjustment of the loss in question, and that the company or its agents, by holding out reasonable hopes of an adjustment

or settlement, deterred the plaintiffs from bringing their suit within the time limited, then in such case the defendant company is estopped from setting up the limitation clause as a defense in this cause."

The defendant asked the court to instruct the jury that if the suit was not brought within six months after the fire occurred, the plaintiffs could not recover, unless they had proved that the commencement of the suit was delayed at the special instance and request of the defendant. This instruction was modified by the court so as to hold that the plaintiffs could not recover unless they had proved that "the company or its agents induced the plaintiffs to delay the bringing of a suit within the time limited in the policy for bringing suit, by holding out reasonable hopes of an adjustment or settlement of the plaintiffs' claim."

The defendant also asked the court to give to the jury an instruction holding that the offer by the defendant to pay any sum to settle, or with a view of effecting a settlement of plaintiffs' claim, was not to be taken or considered as an admission by the defendant of any liability to the plaintiffs, and should not be considered as evidence of any obligation on the part of the defendant to pay the plaintiffs' claim, or of indebtedness by the defendant to the plaintiffs. This instruction the court modified by adding thereto as follows: "But it may be considered, in connection with all the other evidence in the case, in determining whether there was any waiver of the limitation clause of the policy by the company."

The defendant asked the court to give to the jury another instruction, holding that the offer to pay a sum in settlement of the claim could not be considered by them as a waiver of said condition, nor as an inducement to the plaintiffs to delay the commencement of an action. This instruction was modified so as to hold merely that the offer to pay a sum in settlement of the claim, in itself alone, could not be considered by the jury as a waiver of said condition.

The defendant also asked the court to give the following instruction: "The court instructs the jury that the burden of showing a waiver of the condition requiring the action to be commenced within six months after the loss occurred is on the plaintiffs; and they must show the same by clear and positive evidence, that the defendant requested the plaintiffs to delay the commencement of suit or action. Such request on the part of the defendant cannot be inferred."



This instruction was modified, and given in the following form: "The court instructs the jury that the burden of showing a waiver of the condition requiring action to be commenced within six months after the fire occurred is on the plaintiffs, and they must show the same by a preponderance of the evidence, or they cannot recover in this action."

We are of the opinion that the rules of law here involved were correctly given to the jury. The main propositions which the defendant sought, without success, to have embodied in the instructions were, that to show a waiver by the defendant of the limitation clause in the policy, it was incumbent upon the plaintiffs to prove that their delay in bringing suit was at the special instance and request of the defendant, and also, that such proof could only be made by positive evidence, and could not be inferred. That such is not the law is clearly established by the authorities. Thus in *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466, where the question arose in this state for the first time, the rule was laid down as follows: "Where an insurance company shall, by fraud, or by holding out reasonable hopes of an adjustment, deter a party assured, being under such a condition to sue, from commencing his suit, he honestly confiding in the pretenses and promises of the assurer, the condition would be no bar." This statement of the law has been cited with approval in various subsequent cases: *Farmers' and Merchants' Ins. Co. v. Chesnut*, 50 Ill. 111; 99 Am. Dec. 492; *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Home Ins. Co. v. Myer*, 93 Ill. 271.

The same doctrine obtains in other states. In *Martin v. State Ins. Co.*, 44 N. J. L. 485, 43 Am. Rep. 397, it is said: "If the delay to bring suit is a result to which the company mainly contributed, by holding out hopes of an amicable adjustment, the company cannot be permitted to take advantage of the delay, under the limitation clause of the policy." In *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494, an instruction was given to the jury, holding that if the plaintiff delayed bringing suit after the expiration of six months, in consequence of inducements held out by the defendant's officer, causing him to believe that the loss would be paid or adjusted without suit, this would operate to remove the bar created by the condition of the policy requiring an action thereon to be brought within six months after the loss. The court, in sustaining this instruction, said: "A course of conduct on the part of defendant, or representations of its

officers, which would give reasonable ground upon which plaintiff did in fact base the belief that his claim would be settled, would estop defendant to set up the limitation provided by the policy. It would be contrary to justice for defendant to hold out the hope of an amicable adjustment of the loss, and thus delay the action of plaintiff, and then be permitted to plead this very delay, which was caused by its own representations, as a defense to the action when brought." See also *St. Paul F. & M. Ins. Co. v. McGregor*, 63 Tex. 399; *Ripley v. Aetna Ins. Co.*, 29 Barb. 552; *Barnum v. Merchants' F. Ins. Co.*, 97 N. Y. 188; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

It is true the plaintiffs in the present case, in their replication, in addition to alleging that the defendant held out reasonable hopes for an adjustment, and thereby deterred the plaintiffs from commencing their suit, and that the plaintiffs honestly confided in the promises and pretenses of the defendant, also allege that they delayed bringing suit at the request of the defendant. This latter allegation, however, was unnecessary, as the other matters alleged in the replication, and which the evidence tended to prove, constituted of themselves a sufficient answer to the plea setting up the limitation clause. It was proper, therefore, to disregard the allegation of a request by the defendant to delay bringing suit as mere surplusage.

We have now to consider whether any error of law was committed by the trial court in respect to the defenses sought to be based upon the other conditions of the policy. On this branch of the case our attention is directed mainly to the clause which provides that the policy shall become void and of no effect "by a failure or neglect of the assured to notify this company that a contract has been signed to sell the property so insured." The facts are, that on and prior to September 7, 1883, the plaintiffs were partners under the firm name of Little, Peck, & Co., and, as such partners, were the owners of a leasehold interest in certain lands in Duluth, Minnesota, and were also owning and operating a steam saw-mill and appurtenances situated on said lands, said saw-mill and appurtenances being the property afterward insured by the policy now in suit. On said seventh day of September, 1883, the plaintiffs, with a view, as the evidence tends to show, of ultimately dissolving their partnership, entered into an agreement among themselves by which Little and Peck agreed to sell their undivided two-thirds interest in the leasehold estate

in the lands, and also the saw-mill and appurtenances, to Simonds, for \$16,667, of which Simonds was to pay \$2,500 in three days, \$2,500 in fifteen days, \$5,000 in forty-five days, and the residue in six months, the conveyance to be made January 1, 1884. Simonds made various payments aggregating \$7,000, leaving \$9,667 and interest unpaid, and as he was unable to make further payments, neither party took any further steps to perform the agreement, or to enforce further performance of the other party. The title to the property, so far as it was affected by the agreement, was in this situation on the twenty-first day of June, 1884, the date of the policy, and so remained at the date of the loss.

We are of the opinion that the above-mentioned condition, requiring notice to the insurance company of any contract to sell the property insured, must be held to apply only to contracts of sale between the assured and third parties, and that it can have no application to contracts between the assured themselves for the sale or transfer of their respective interests as partners or joint owners. The word "sale," as here used, should doubtless receive the same interpretation which properly belongs to it when used in those conditions which provide that a policy shall become void upon alienation of the property by sale or otherwise. The preponderance of authority in this country is clearly to the effect that such condition is not broken by a sale by one partner to another of his joint interest, at least so long as the party selling retains an insurable interest in the property insured.

In Angell on Insurance, sec. 197, it is said: "When several owners of property are jointly insured, a sale by one of the owners of his interest in the premises to the other owners is not such an alienation of the property as will avoid the policy, even under an express provision in the act under which the insurance company is incorporated, declaring that when any property insured with such company shall be alienated by sale or otherwise, the policy shall become void. Yet if the assignor had conveyed his interest to a stranger, the policy would cease to operate as to that share at least." Also, Mr. May, in discussing the question whether a sale by one joint owner to another is such alienation as will avoid the policy, says: "The better opinion seems to be, that it is not strictly an alienation, — a transfer from one to another, — but rather a shifting of interests amongst joint owners, without the introduction of any stranger to the number of the insured.

So far as the contract is based upon the personal qualities of the insured, there is no increase of risk, because no element of improvidence or carelessness is introduced, and the property insured will still be under the care and management of the original parties": May on Insurance, sec. 279.

It is held in numerous cases that, where an insurance policy is issued to a partnership, a transfer by one partner to the others of all his interest in the partnership property will not vitiate the insurance, notwithstanding a condition that the policy should become void if the property should be sold or conveyed, or the interest of the parties therein changed: *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; 7 Am. Rep. 581; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551; 20 Am. Rep. 583; *Powers v. Guardian Ins. Co.*, 136 Mass. 108; 49 Am. Rep. 20; *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; 22 Am. Rep. 294; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Dermnai v. Home Mut. Ins. Co.*, 26 La. Ann. 69; 21 Am. Rep. 544; *Drennen v. London Assur. Corp.*, 20 Fed. Rep. 657.

In some of the cases it is held that where one of several joint owners in whose names the property is insured transfers his interest in the property to the other joint owners, so as to retain in himself no insurable interest, no recovery can be had on the policy; but this is not because of the forfeiture imposed by the condition against alienation, but because at common law the suit must be brought in the joint names of the insured, and as the assigning plaintiff would have no insurable interest, no recovery could be had in his name. This seems to have been the real ground upon which the decision of this court was based in *Dix v. Mercantile Ins. Co.*, 22 Ill. 272, although the court, after sustaining the judgment of the court below on this ground, went further, and held that the assignment by a partner to his copartners of all his interest in the property insured was a breach of the condition of the policy in that case. It should be observed, however, that said condition provided that the policy should be void in case of "any transfer or change of title of the property insured, or of any undivided interest therein," a condition which may well be construed as applying even to a sale by one partner to the other partners of his interest in the partnership property. It is not inconsistent with the rule established in that case, therefore, to hold that a sale by one partner to another

of his interest in the property insured in the firm name is not a breach of a condition merely providing generally against alienation by sale, so long, at least, as the party selling retains an insurable interest in the property insured.

Upon substantially the same grounds it must be held that the contract to sell contemplated by the condition of the policy in this case was a contract between the insured, or some of them, and some third party. The actual interests of partners in the firm property are necessarily fluctuating, and there seems to be no particular reason why the insurers should wish to keep the ownership unchanged as between them, so long as all retain an insurable interest. The effect of the contract in this case was merely to modify the relative rights of the partners to a certain extent, leaving them all interested in the firm and its property, and admitting no stranger to the possession or control of the property insured.

The instructions to the jury upon this branch of the case were in harmony with the views above expressed, and we are of the opinion that they are subject to no just criticism.

It is further objected that there was such change in the possession of the property insured as should be held to be a breach of the condition which provided that the policy should be void and of no effect if there should be any change in the possession of the property insured. The change of possession here referred to clearly must be some change during the term of the policy, and it is sufficient to say that there is no evidence tending to show any such change of possession. Little and Simonds were in possession at the date of the policy, and their possession continued without interruption or change down to the time of the fire. There was no condition or stipulation in the policy that Peck, the other member of the firm insured, should be in possession, but merely that the possession should remain during the term of the insurance as it was at its commencement.

Those conditions of the policy relating to misrepresentations or concealments as to the situation or occupancy of the property, or the interest of the insured therein, are in that clause which refers to an application, plan, survey, or description, and assumes to make such paper a part of the policy and a warranty by the insured. The record, however, fails to disclose the existence of any such paper, and so the clause which refers to it and attempts to prescribe its place and effect as a part of the contract, and to determine the consequences of

misstatements or omissions therein, must be regarded as inapplicable to the facts in the case, and therefore nugatory.

After a patient investigation, we are unable to find any material errors in the record. The judgment of the appellate court will therefore be affirmed.

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**INSURANCE — WAIVER OF CONDITION AS TO TIME OF INSTITUTING SUIT.** — A condition in an insurance policy, requiring suit to be brought within six months after the loss, may be waived, and such waiver need not be express, but may consist of the acts and conduct of the company and its officers which throw the insured off his guard, and lull him into security until the expiration of the time mentioned in the condition: *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739; *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; 25 Am. Rep. 96, and note 104-107; *Case v. Sun Ins. Co.*, 83 Cal. 473.

**INSURANCE — CHANGE OF TITLE — SALE BY ONE PARTNER TO ANOTHER.** — The weight of authority is decidedly in favor of the rule of the principal case, holding that a transfer by one partner of his interest in the partnership property is not a sale, conveyance, or change of interest such as will avoid an insurance policy: Note to *Hathaway v. State Ins. Co.*, 52 Am. Rep. 443.

**INSURANCE — SURVEY AND DIAGRAM REFERRED TO IN POLICY.** — Where a policy of fire insurance provides that for further particulars reference is hereby made to an application, survey, and diagram furnished by and a warranty on the part of the insured, which is made a part of the policy, the fact that such survey and diagram were not furnished till after the policy was delivered, while it may have deprived them of any force as a warranty, does not destroy their effect as evidence of a representation of facts made as an inducement for the policy: *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, *ante*, p. 460, and note.

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## HINCKLEY v. HORAZDOWSKY.

[183 ILLINOIS, 359.]

**MASTER NOT LIABLE FOR RISKS ASSUMED BY MINOR SERVANT WHEN.** —

A master is not liable for risks assumed by his minor servant, if the servant has sufficient capacity to take care of himself, and knows and can properly appreciate the risk.

**MASTER LIABLE TO MINOR SERVANT FOR INJURIES FROM PERILS NOT KNOWN OR APPRECIATED BY HIM.** — A minor servant can recover from his master for injuries suffered by him from any peril which he did not know, or which he could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed.

**DUTY OF MASTER TO MINOR SERVANT.** — A master who employs a child must look out for him, and see that he is not exposed to danger arising from the structure of building or machinery, which an operative of ordinary intelligence and experience would perceive. Notice of the danger is not enough, but the child must have sufficient instructions to enable him to avoid danger.

**JUDGMENT OF APPELLATE COURT SETTLES FACTS WHEN.** — The supreme court must accept a judgment of affirmance in the appellate court as having settled the facts necessary to make out the plaintiff's case in his favor, unless it can see that there is no evidence tending to support a material element of the case.

**EVIDENCE NOT CONCLUSIVE AGAINST MINOR SERVANT'S RIGHT TO RECOVER FOR INJURY, WHAT.** — Proof that a minor servant had done the work in the doing of which he was injured, for some time prior to the accident, and of the number of times he had done it, may be properly considered by the jury in determining whether or not it was negligence in the master to require him to continue to do it, and also for the purpose of determining whether the injury resulted from the servant's inexperience and want of judgment, or from his own negligence; but it cannot be held to be conclusive against his right to recover.

**STATEMENT AS TO FACTS ADMITTED, MADE BY COURT TO JURY, NOT ORAL INSTRUCTION.** — A statement made by the court to the jury, that certain facts were admitted by counsel, is in no sense an oral instruction, and constitutes no ground for reversal, where no objection was made to it at the time, and the facts were not disputed.

**RULE RELIEVING MASTER FROM LIABILITY FOR INJURY RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT NOT APPLICABLE TO CASE OF CHILD.** — A master, in order to defeat a recovery on the ground that the injury resulted from the negligence of a fellow-servant, must show not only that the injury was caused by the negligence of the fellow-servant, but also that the master had used ordinary care and prudence in employing such fellow-servant. If, however, the injured servant is a child, incapable of comprehending the risk, the rule relieving the master from liability for the negligence of a fellow-servant does not apply.

**ACTION on the case.** The opinion states the facts.

*McKenzie and Wood*, for the appellant.

*Jones and Lusk*, for the appellee.

**WILKIN, J.** This is an action on the case, by appellee, against appellant, and other defendants not served, to recover for a personal injury alleged to have been received by him through their negligence.

The declaration is of one count only, and avers that defendants were, on the 4th of July, 1886, the owners of and operating a planing-mill in the city of Chicago, wherein they used and employed certain machines for planing wood, and said plaintiff, then a minor of the age, to wit, twelve years, was then and there employed and engaged by said defendants in and about their said business, and while so employed and engaged, the plaintiff was then and there, by said defendants, negligently and improperly ordered and directed to attend to and oil one of the machines then and there used and operated, and being used and operated, by said defend-

ants, which said direction and order of said defendants was then and there dangerous and hazardous to this plaintiff, because of his tender age, as aforesaid, and well known so to be by said defendants; and while said plaintiff was engaged in attending to and oiling said machine, in obedience to said order and direction of said defendants, and using all due care and diligence, the arm of said plaintiff was caught, crushed, and mangled in and by said machine, so that plaintiff is and will be a cripple for life because thereof, and deprived of the use of said arm. The plea was the general issue. Plaintiff below recovered a judgment for three thousand dollars, and costs, which the appellate court has affirmed.

It must be admitted, we think, that the declaration is rather an unusual one, and somewhat loosely drawn. It does not proceed upon the theory that the injury was received while plaintiff was performing labor outside of his contract of employment, although his counsel so treat it in their argument. The negligence complained of in the declaration is, that the defendants wrongfully ordered the plaintiff, he being a child, without experience in such matters, to oil a piece of machinery, the doing of which exposed him to great peril of life and limb. It is not the case merely of a minor being set at dangerous work, for in such cases the master is not liable for the risk if the servant has sufficient capacity to take care of himself, and knows and can properly appreciate the risk: 1 *Shearman and Redfield on Negligence*, 4th ed., sec. 218. It belongs to the other class of cases mentioned by the authors in the same section, of which it is said: "But while the mere fact of minority is deemed immaterial, it is well settled, in America at least, that any actual incapacity of a minor to understand and appreciate the perils to which he is exposed is to be fully considered, and that he can recover from his master for injuries suffered from any peril the nature of which he did not know, or could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed." And says Wharton, in his work on negligence (sec. 216): "Hence we may hold that where a child is employed, the employer must look out for the child, and must see that it is not exposed to danger arising from the structure of building or machinery which an operative of ordinary intelligence and experience would perceive. Notice of danger is not enough. The child must have sufficient in-



structions to enable him to avoid danger." Many cases are cited by both these authors in support of the text.

The rule is so just and humane, when applied to a case clearly falling within its principles, that no court would hesitate to enforce it as of first impression. Children of tender years are often employed about factories in which are used pieces of complicated and dangerous machinery. If one of these is sent by the master or his superintendent, with or without instructions, where he will be exposed to revolving wheels, belts, and pulleys, any one may know that, by reason of his inexperience and immature judgment, he is liable to be killed or maimed; and if he is injured, while using due care for one of his capacity, it would seem too clear for argument that the master should be held liable. To say that such a child takes the risk of his employment—that if he is not willing to take the hazard of obeying the command, he must refuse—is idle, if not cruel. By his inexperience he is unable to comprehend the risk; by his childish instincts he implicitly obeys. Of the existence of the rule, and its pre-eminent justice, there can be no doubt. Does this case fall within it? This question, with us, is not, Does the evidence bring plaintiff clearly and satisfactorily within the rule? for unless we can say there is no evidence tending to support a material element of the case, we must accept the judgment of affirmance in the appellate court as having settled the facts necessary to make out plaintiff's case in his favor.

It is contended, however, that the evidence wholly fails to show that the foreman of defendants ordered the plaintiff to oil the machine by which he was hurt, and that the boy's own testimony proves the contrary. We do not so construe it. It certainly tends to prove that he was attempting to oil the machine, because he had been told to do so by Joseph Knourek, the foreman. True, the foreman did not, at that moment, command him to do so; but he testified that he had general instructions from the foreman to attend to that duty when the machine needed oil, and his evidence at least tends to show that he was, at the time he received his injury, attempting to obey those instructions. It does not very clearly appear from the evidence how the injury was incurred. The knee, as we understand the evidence, was first caught by a revolving plate, and then the hand was drawn between the rollers; but just how the knee came in contact with the plate, or how the hand was brought between or within the rollers, does not appear. It

is, however, shown by the boy's testimony that in oiling the machine while in motion he was exposed to a running belt, and compelled to extend his arm over it. In other words, the effect of his evidence is, that to oil that machine while running was attended with danger. It is doubtless true that the foreman, or other experienced person with mature judgment, could do so with comparative safety; but it is clear from the evidence, especially from the painful results, that it was hazardous for a child to attempt it. The fact that appellee had done that work for some time prior to the accident, and the number of times he had done so, were very proper facts to be considered by the jury in determining whether or not it was negligence in the foreman to require him to continue to do so, and also for the purpose of determining whether or not the injury resulted from inexperience and want of judgment, or from his own negligence; but such proof cannot be held to be conclusive against his right to recover. A child exposed to danger may escape for a time, but sooner or later an injury will, in all probability, occur.

The case of *Gartland v. Toledo etc. R'y Co.*, 67 Ill. 498, strenuously insisted upon as governing this case, is not in point. There the question was, whether a minor employee should be held bound by the rule which prevents a recovery from the common master for an injury resulting through the negligence of a fellow-servant. It was held that the mere fact that the plaintiff in that case was under twenty-one years of age did not relieve him from the risk of negligence on the part of co-employees. Here it was a question of fact for the jury, whether or not appellee was a child within the rule stated.

It appears from an amended bill of exceptions that on the trial the court stated to the jury: "It is admitted by and between counsel that these defendants were owning and controlling the planing-mill when the injury occurred, and that this foreman was their foreman." It is said this statement amounted to an oral instruction as to the law of the case, and was therefore erroneous. It is not denied that the statement as to the ownership of the planing-mill was authorized by a stipulation of counsel, but it is insisted that the further statement that the foreman was defendants' foreman was a conclusion which, if properly drawn from the stipulation, could only have been properly given to the jury in writing. In the first place, the statement was not in any sense an instruction to the jury. Again, it was made in open court, and no objection was made

to it, either as a statement of the agreement or as an oral instruction. And finally, it was immaterial. It was not denied on the trial that the foreman who gave the order complained of to appellee was the foreman of appellant. His own testimony shows it.

It is also insisted that the court below improperly refused the following instruction: "If the jury believe from the evidence that the plaintiff was injured by following the direction or obeying the orders, or through the carelessness or by the fault, of his fellow-servant, Willie Knourek, then the plaintiff cannot recover."

The reason why the common master is not held liable for an injury caused by the negligence of a fellow-servant is because that is one of the ordinary risks of the employment. But if the injured employee is a child, incapable of comprehending that risk, the rule ought not to apply. However, this instruction does not announce the rule correctly as applied to fellow-servants generally. It not only assumes that Willie Knourek was a fellow-servant of appellee, but that the master had used due care in the selection and employment of him. The instruction attempts to set up an affirmative defense; and to make it available, it was not only necessary to show that the injury was caused by the negligence of a fellow-servant, but also that the master had used ordinary care and prudence in employing such fellow-servant.

In the foregoing view of the law applicable to the facts of this case, the instructions given to the jury are not subject to the criticism made upon them, and, in our opinion, they are free from substantial error. We repeat, this is not the case merely of a minor, under twenty-one years of age, suing for an injury, but of a child to whom the employer owed a special duty.

After a careful re-examination of this case, we have reached the conclusion that our former judgment of affirmance was right.

Judgment affirmed.

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**MASTER AND SERVANT — RISKS ASSUMED BY MINORS.** — As to what risks are assumed by minor servants, see *Rummel v. Dikworth*, 131 Pa. St. 509; 17 Am. St. Rep. 627, and note; *Zura v. Tellow*, 134 Pa. St. 213; *Fiak v. Central etc. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note 28-31. Minor servants assume the risks of negligence from fellow-servants: *Hefferen v. Northern etc. R. R. Co.*, 45 Minn. 471; and risks from apparent and obvious dangers: *Lehigh etc. Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680, and note;

*McCarragher v. Rogers*, 120 N. Y. 526. A young and inexperienced servant does not assume the risks of latent dangers: *Davis v. Railway*, 53 Ark. 118.

**MASTER AND SERVANT—DUTY TO MINOR SERVANTS.**—The employer who employs young servants must satisfy himself that they have the requisite capacity and experience to do their work safely, or he must instruct them sufficiently to warn them against danger: *Gulf etc. R'y Co. v. Jones*, 76 Tex. 350; *Rummel v. Dilworth*, 131 Pa. St. 509; 17 Am. St. Rep. 837, and note.

## SHAFFNER v. PINCHBACK.

[183 ILLINOIS, 410.]

**BETTING ON HORSE-RACE GAMING, AND CONTRACT IN AID THEREOF VOID.**—

Betting money on a horse-race is gaming, and in violation of law, and a contract in aid of the offense of gaming is void, and cannot be recovered upon. Where, therefore, one person advances money to another to be used by them as partners in the business of betting on horse-races, he cannot recover back the money so advanced.

**LAW REFUSES AID TO PARTIES IN PARI DELICTO.**—If persons engage in an unlawful business, such as betting on horse-races, in such a manner as to be in *pari delicto*, the law will not aid either of them, but will leave them in the positions in which they have placed themselves.

**ACTION to recover money alleged to have been loaned.** The opinion states the case.

*B. M. Shaffner, pro se.*

**BAKER, J.** This is an action brought by Shaffner, against Pinchback, to recover the sum of one thousand dollars, alleged to have been loaned by the former to the latter. Upon trial in the circuit court, verdict was rendered for the defendant, and judgment entered thereon. On appeal to the appellate court the judgment was affirmed, and the cause is brought to this court by writ of error.

The evidence introduced at the trial by plaintiff in error tended to prove that on August 16, 1886, he loaned to defendant in error the sum of one thousand dollars, and that the latter was to pay him, for the use of said money, one half of the net winnings of a certain "book-making" business at horse-races, to be conducted and managed by defendant in error. It also tended to prove that said business was a success, and won money at the Saratoga races. The evidence offered by defendant in error tended to prove that the parties each contributed one thousand dollars, to form a capital of two thousand dollars, to be used in the business of "making books" on horse-races; that book-making consists

of taking and paying wagers on such races; that the parties were partners in such venture, and that the two thousand dollars, with the exception of thirty dollars, had been lost on wagers; and that he had retained the fifteen dollars, that would otherwise be going to plaintiff, on an indebtedness which was due and unpaid.

It is claimed that the two instructions given at the instance of the defendant were erroneous. Those instructions were as follows:—

“1. The court instructs the jury, as a matter of law, that if they believe from the evidence that the plaintiff and the defendant in this suit put together the sum of one thousand dollars each for the purpose of betting and wagering the same on horse-races, then the jury will find the issues for the defendant.

“2. The court instructs the jury, as a matter of law, that if they believe from the evidence that the plaintiff and the defendant were copartners in the business of making books on horse-races, and that the money given the defendant by the plaintiff was in furtherance of said partnership business of book-making on horse-races, then the jury will find for the defendant.”

That betting money on a horse-race is gaming, and in violation of law, was decided in *Tatman v. Strader*, 23 Ill. 494; and that a contract in aid of the offense of gaming, which is prohibited by statute, is void, and cannot be recovered upon, was held in *Mosher v. Griffin*, 51 Ill. 184; 99 Am. Dec. 541. It is probable that the instructions complained of would have been proper enough if they had been predicated only upon the testimony introduced by the plaintiff. But waiving that question, they were based upon the theory of the facts that the defendant's evidence tended to prove, and were fully justified by that evidence.

It is suggested that defendant occupied the position of a stake-holder, and the well-recognized rule that money may be recovered by the depositor from the stake-holder, if it has not been paid over, is sought to be invoked; hence it is said these instructions were erroneous, in that they ignored the question whether the money was lost on the bets, and had been paid out by the defendant. The evidence for defendant was to the effect the venture in which plaintiff's one thousand dollars was invested was a joint or partnership venture, each of the parties contributing one half of the capital, and

that they were to divide the proceeds equally. If this be true, defendant was not a stake-holder, but a partner of the plaintiff in the book-making business.

It is urged that the view that defendant can keep the one thousand dollars furnished by plaintiff, without any consideration therefor, is so opposed to reason and conscience as to be untenable. The judgments of the trial and of the appellate courts are conclusive of the fact that plaintiff and defendant jointly engaged in a business which was in violation of law. They were, in respect to such business, *in pari delicto*, and the law will refuse its aid to assist either, but will leave them in the positions in which they have placed themselves. Plaintiff in error, having embarked his money in an enterprise prohibited alike by the statute, by good conscience, and by public policy, placed himself and his money outside of the pale of the law, and if he has been despoiled by the failure of his associate to account for the funds placed in his hands for the purpose of carrying on the unlawful business, then both good morals and public policy require that the law should not aid him. We find no error in the instructions of which complaint is made.

The judgment is affirmed.

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**WAGER — BETTING ON A HORSE-RACE.** — A wager on a horse-race is void, as against morals and public policy: *Gridley v. Dora*, 57 Cal. 78; 40 Am. Rep. 110; and money lost in such a bet may be recovered back by the loser: *Ellis v. Beale*, 18 Me. 337; 36 Am. Dec. 726, and note. *Contra*, see *Dunman v. Strother*, 1 Tex. 89; 46 Am. Dec. 97, and note.

**CONTRACTS — PARTIES IN PARI DELICTO.** — Courts will not enforce illegal contracts, but will leave the parties and those *in pari delicto* where they find them: *Bowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; *Kirkpatrick v. Clark*, 132 Ill. 242; 22 Am. St. Rep. 531, and note.

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## SHREFFLER v. NADELHOFFER.

[133 ILLINOIS, 536.]

**NECESSITY OF FORMAL ISSUE WAIVED BY GOING TO TRIAL WHEN.** — Where a defendant goes to trial without objecting that one of his pleas has not been answered, and without moving for any judgment thereon for want of a replication, he thereby waives the necessity of a formal issue on that plea, and the irregularity is cured by verdict.

**DISMISSAL OF COUNT OF COMPLAINT CARRIES PLEA THERETO WITH IT — PLEADING OVER AFTER DEMURRER OVERRULED PRECLUDES MOTION IN ARREST OF JUDGMENT.** — Where a defendant demurs to a declaration, and, after his demurrer is overruled, pleads over, he will be

precluded from insisting upon a motion in arrest of judgment for insufficiency in the declaration.

**DECLARATION CONTAINING ONE GOOD COUNT SUFFICIENT TO SUSTAIN GENERAL VERDICT.** — Where a declaration contains one good count, it is sufficient to sustain a general verdict, even though all the other counts are defective.

**DEFECTIVE STATEMENT OF CAUSE OF ACTION CURED BY GENERAL VERDICT.** — Where only the statement of a plaintiff's cause of action is defective or inaccurate, the defect is cured by a general verdict in his favor; but where no cause of action is stated, the omission is not cured by verdict.

**RIGHT OF SURETY TO STAND UPON STRICT TERMS OF HIS OBLIGATION.** — A surety has the right to stand upon the strict terms of his obligation, when such terms are ascertained, and his liability is not to be extended, by implication, beyond those terms. But this rule of strict construction in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are primarily determined, but merely limits their liability strictly to the terms of their contract, when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms. Contracts of suretyship are to be construed by the same rule as all other contracts.

**CONSTRUCTION OF CONTRACT SUSCEPTIBLE OF TWO INTERPRETATIONS.** — If a contract is susceptible of two interpretations, one of which would render it merely senseless and nugatory, while the other is consistent with and accomplishes the intention of the parties thereto, the latter should be adopted.

**APPEAL BOND CONSTRUED.** — Where the condition of an appeal bond given by a defendant on an appeal from a decree dismissing a bill and dissolving an injunction is, that if he "shall duly prosecute said appeal, and shall pay all damages, and damages growing out of the continuance of the injunction herein, costs of suit rendered and to be rendered, . . . in case the said decree shall be affirmed in said appellate court, then the obligation to be null and void, otherwise to remain in full force and virtue," — the language of the bond will, considering the circumstances under which it was used, be construed to mean that the obligors undertook to pay all damages growing out of the continuance of the injunction in case the decree should be affirmed.

**ERROR NOT GROUND FOR REVERSAL WHEN.** — A judgment will not be reversed because the court erroneously sustained a demurrer to certain pleas the material facts of which were alleged in other pleas, whereby the defendant had the advantage of the defenses thereby presented.

**ACTION** of debt on a bond given under the following circumstances: On February 6, 1885, Andrew Dillman and Edward R. Knowlton filed a bill in the circuit court against John W. Nadelhoffer, alleging, among other things, the total failure of the consideration of a certain promissory note for eight thousand dollars and interest, executed by them to Nadelhoffer, and praying for an injunction restraining Nadelhoffer from collecting, assigning, or transferring said note. An injunction *pendente lite* was issued and served, and on June

27, 1885, a decree was entered dissolving the injunction and dismissing the bill for want of equity. An appeal was thereupon granted by the court to the appellate court, "on condition that said complainants do file their good and sufficient appeal bond, in the penal sum of ten thousand dollars, with Andrew H. Shreffler and Henry A. Sanger as sureties thereon, conditioned that said complainants shall prosecute said appeal, and shall, moreover, pay all damages, and damages growing out of the continuance of the injunction herein, costs of suit rendered and to be rendered against them, the said complainants, by said court, in case the said decree shall be affirmed in said appellate court." The complainants thereupon presented the bond now in suit as their appeal bond, which being approved, the court ordered that the injunction remain in force pending the appeal. On February 20, 1886, the said decree was affirmed by the appellate court, and judgment was rendered in favor of Nadelhoffer for his costs in that court. On April 12, 1886, Nadelhoffer brought suit on said note in the circuit court, and on the 14th of June, 1887, judgment was rendered in favor of Nadelhoffer for \$9,094.76 and costs. Two executions were subsequently issued on this judgment, both of which were returned wholly unsatisfied. Nadelhoffer was paid on said judgment by the administrators of said Edward B. Knowlton, who died insolvent pending the suit on the bond, the sum of \$842.86. This was all that was paid. The evidence tended to show that at the time of the commencement of the injunction suit all the parties to said note were persons of good credit and financial standing, and that Nadelhoffer had negotiated the sale thereof to certain parties for eight thousand five hundred dollars, but the sale was not consummated, owing to the injunction suit and the continuance of the injunction. The evidence also tended to show that during the pendency of said appeal all of said parties surviving became insolvent and lost their financial credit, and that at the time of the affirmance of the decree, said note had become entirely unsalable, and that Nadelhoffer had never been able to realize anything thereon, except the small dividend from the estate of Edward B. Knowlton, deceased. The cause came on for trial by the court, a jury having been waived, and judgment was rendered for the plaintiff for eight thousand five hundred dollars. The appellate court affirmed this judgment, and the defendants appealed to this court. Other facts appear from the opinion.



*Garnsey and Knox, B. Olin, George S. House, and John N. Jewett, for the appellants.*

*Hill and Haven, and Haley and O'Donnell, for the appellees.*

BAILLY, J. Certain questions arising upon the pleadings are presented by counsel, which we will notice first. It is said that the defendants' eighth plea presented a complete defense to the action, and as that plea was unanswered, judgment should have been rendered thereon for the defendants. It appears that the defendants went to trial without objection that said plea was unanswered, and without moving for any judgment thereon for want of a replication. They thereby waived the necessity of a formal issue. As we said in *Strohm v. Hayes*, 70 Ill. 41, it is the settled doctrine of this court that proceeding to trial where an issue is not made up on one of the pleas, such issue is considered as waived, or the irregularity is cured by verdict. Furthermore, said eighth plea purports to answer only the third count of the declaration, and as that count was dismissed by the plaintiff prior to the trial, such dismissal carried the eighth plea with it, and that plea was no longer in the case, and there was no occasion for answering it.

Again, it is insisted that each of the several counts in the declaration is insufficient to show a cause of action, and that the defendants' motion in arrest of judgment should therefore have been sustained. The alleged defect in the first, second, and fourth counts is, that, except as to the first breach assigned in the first count, there is no averment that the decree recited in the appeal bond has ever been affirmed by the appellate court. It is difficult to see how, as the record now stands, the defendants can avail themselves of this defect in the second count, or in the second breach assigned in the first count. Said second breach in the first count and said second count were both demurred to by the defendants, and their demurrer being overruled, they abandoned it, and filed various pleas in bar. The only assignment of error by which the alleged defect in the first and second counts is presented for consideration here is the one which calls in question the decision of the trial court overruling the defendants' motion in arrest of judgment; and the settled doctrine of this court is, that where a defendant demurs to a declaration, and, after his demurrer is overruled, pleads over, he will be precluded from insisting upon a motion in arrest of judgment for insufficiency

in the declaration: *Quincy Coal Co. v. Hood*, 77 Ill. 68; *American Express Co. v. Pinckney*, 29 Ill. 392; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625; *Rouse v. County of Peoria*, 2 Gilm. 99; 2 Tidd's Practice, 918.

But we think the fifth count, especially after verdict, is sufficient to sustain the judgment, and that being so, the court properly overruled the motion in arrest of judgment, even though all the other counts may have been defective. Section 57 of the Practice Act provides that "whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts of the declaration be sufficient to sustain the verdict." See also *Gebbie v. Mooney*, 121 Ill. 255, and authorities cited. The objection urged to the other counts does not exist in the fifth count, as that count contains a sufficient averment of the affirmance by the appellate court of the decree appealed from. But it is claimed that said count is defective in failing to state the names of the parties who had agreed to or were about to purchase said note, and the sale to whom was defeated by the continuance of the injunction.

The allegation of damages in said count is, in substance, that at the time the order continuing the injunction was made the note, the sale and transfer of which was restrained, had a market value of ten thousand dollars, the makers and guarantors of said note then being men of great wealth and financial standing; that but for the injunction the note could have been negotiated and sold for that sum, and that the plaintiff was offered that sum for it by divers responsible parties, and would have disposed of and sold it, without recourse, for that sum, if the injunction had not been continued in force; that by reason of the continuance of the injunction the plaintiff was delayed and hindered in making such disposition of the note for the period of ten months, and that during that period the makers and guarantors of the note became financially irresponsible, whereby the note became worthless.

Without pausing to determine whether, in this case, the rules of good pleading require the plaintiff to state the names of the parties who had offered to purchase said note, or to whom he would have sold it if he had not been prevented from doing so by the continuance of the injunction, the case is one merely of a defective statement of a cause of action, and not one where no cause of action is stated, and the defect is there-

fore one which is cured by verdict. The rule on this subject, as laid down by Mr. Gould, in his treatise on pleading, is as follows: "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete a title so imperfectly stated must be proved at the trial; and it is therefore a fair presumption that they are proved. But where no cause of action is stated, the omission is not cured by verdict. For, as no right of recovery was necessary to be proved, or could have been legally proved, under such a declaration, there can be no ground for presuming that it was proved at the trial": Gould on Pleading, 463. The allegations of said fifth count were clearly sufficient to admit proof of the names of the parties with whom the plaintiff had negotiated the sale of said note, and to whom he was prevented from making such sale by the continuance of the injunction, and it will therefore be presumed, as was the fact, that such proof was made at the trial.

But the question to which our attention has been chiefly directed, and the one which presents the greatest difficulty, is, whether any breach of the condition of the bond sued on is shown. The decision of that question must turn wholly upon the construction to be placed upon the language of the condition. That language is as follows: "Now, if the said Andrew Dillman and Edward R. Knowlton shall duly prosecute said appeal, and shall, moreover, pay all damages, and damages growing out of the continuance of the injunction herein, costs of suit rendered and to be rendered against them, the said Andrew Dillman and Edward R. Knowlton, by said court, in case the said decree shall be affirmed in said appellate court, then the obligation to be null and void, otherwise to remain in full force and virtue."

The judgment of the appellate court simply affirmed the decree appealed from, and awarded the appellee, the plaintiff, his costs in that court. No judgment for damages was rendered by the appellate court against Dillman and Knowlton, or the survivor of them, and no such judgment could have been rendered, as that court had no jurisdiction or authority, on affirming the decree, to make an award to the party entitled thereto of his damages growing out of the continuance of the injunction. It is not disputed that the costs adjudged to the appellee were paid prior to the commencement of the

suit on the bond, and there was therefore no breach of the condition of the bond by reason of the non-payment of said costs.

The defendants contend that, by a proper construction of said condition, the phrase "rendered and to be rendered against them, the said Andrew Dillman and Edward R. Knowlton, by said court," should be held to apply to and qualify the words "all damages, and damages growing out of the continuance of the injunction herein," and therefore that no damages consequent upon the taking of the appeal, or growing out of the continuance of the injunction, are within the condition, except such as the appellate court should award in its judgment. As the appellate court had no power to award damages growing out of the continuance of the injunction, this construction manifestly renders that part of the condition wholly meaningless and nugatory.

Two of the defendants being sureties, their liability must undoubtedly be determined in accordance with the rules of law applicable to that relation. It is a rule universally recognized by the courts that a surety has a right to stand upon the strict terms of his obligation, when such terms are ascertained. As said by Mr. Justice Story in *Miller v. Stewart*, 9 Wheat. 681: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of the contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change of the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

The rule thus laid down by Mr. Justice Story has been repeated and adopted by this court in numerous decisions: *Field v. Rawlings*, 1 Gilm. 581; *Waters v. Simpson*, 2 Gilm. 570; *Reynolds v. Hall*, 1 Scam. 35; *People v. Moon*, 3 Scam. 123; *Governor v. Ridgway*, 12 Ill. 14; *Ryan v. Trustees of Shawneetown*, 14 Ill. 20; *Chicago & A. R. R. Co. v. Higgins*, 58 Ill. 128; *Stull v. Hance*, 62 Ill. 52; *People v. Tompkins*, 74 Ill. 482; *Cooper v. People*, 85 Ill. 417; *Mix v. Singleton*, 86 Ill. 194; *Phillips v. Singer Mfg. Co.*, 88 Ill. 305; *Dodgson v. Henderson*.

113 Ill. 360; *Trustees of Schools v. Sheik*, 119 Ill. 579; 59 Am. Rep. 830; *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; *Vinyard v. Barnes*, 124 Ill. 346. In many of these cases we have said that the contract of a surety is to be strictly construed, and that his liability is not to be extended by implication, and such has long been the settled law in this state.

It is not meant by this rule, however, that the courts, in endeavoring to ascertain the precise terms of the contract actually made by a surety, may not resort to the same aids and invoke the same canons of interpretation which apply in case of other contracts. Thus in *Stull v. Hance*, 62 Ill. 52, the rule that in construing contracts and written agreements the whole context should be considered, and the intention of the parties ascertained from it, was applied to the interpretation of the contract of a surety; and in *Mix v. Singleton*, 86 Ill. 194, where a similar contract was under consideration, the rule that the words used should be construed as ordinarily understood was applied. Indeed, any other mode of interpretation would lead to the absurd result of giving to the same set of words in a contract one force and meaning when the principal is defendant, and a different force and meaning when the suit happens to be brought against the surety or guarantor. The rule of strict construction, as applied to the contracts of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms.

Various decisions in other states may be cited in support of this position. Thus in *Locke v. McVean*, 33 Mich. 473, the court, after reviewing many English and American decisions, says: "The view now generally received appears to be, that, for the purpose of finding out what the contract is, the same course is to be pursued that the law authorizes to ascertain what the parties have agreed upon in the case of other mercantile contracts, but when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply." In *Kastner v. Winstlerley*, 20 U. C. C. P. 101, the court, after reviewing various English authorities, says: "The rule of construction, then, of a contract of this description is to con-

strue it as all other contracts, not giving a strict meaning to the words used against the party using them, nor yet as against the party in whose favor they are used, but to collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary, and popular sense, unless by the known usage of the trade they have acquired a peculiar sense, and from the surrounding circumstances."

In *Hamilton v. Van Rensselaer*, 48 N. Y. 244, Mr. Chief Justice Church, in discussing the proper interpretation to be put upon a contract of guaranty, says: "In ascertaining the meaning of the language used, the same rules of construction are applicable to contracts of suretyship as to other contracts. When the true signification of the contract is ascertained, the surety or guarantor has a right to insist that his liability shall not be extended beyond its precise terms." In *Belloni v. Freeborn*, 63 N. Y. 383, the court, in discussing the same subject, say: "There is no rule exclusively applicable to instruments of suretyship and requiring them to be in all cases interpreted with stringency and critical acumen in favor of the surety and against the creditor, and all ambiguities to be resolved to the advantage of the promisor, and every liability excluded from the operation of the instrument that can, by a strained and refined construction, be deemed outside of the agreement. In guaranties, letters of credit, and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances, and the purposes for which it was made. If the terms are ambiguous, the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases. . . . The surety is not liable on an implied engagement, and his obligation cannot be extended, by construction or implication, beyond the precise terms of the instrument by which he has become surety. But in such instruments the meaning of the written language is to be ascertained in the same manner and by the same rules as in other instruments; and when the meaning is ascertained, effect is to be given to it." See also *Gates v. McKee*, 13 N. Y. 232; *Crist v. Burlingame*, 62 Barb. 351; Brandt on Suretyship, 105 et seq.

It must be conceded that the condition of the bond in question, when read by itself, and without reference to surrounding circumstances, is of doubtful meaning. The draughtsman,

in preparing the bond, instead of drawing two bonds, one to serve as an appeal bond and the other as an injunction bond, took a blank appeal bond, and endeavored, by inserting a clause providing for the payment of the damages growing out of the continuance of the injunction, to make it serve the purposes of both an appeal and an injunction bond. The place in which the last-named clause is inserted and its relation to the other words of the condition are such as to render it uncertain, if we consider merely what appears upon the face of the instrument, whether the undertaking is to pay all damages growing out of the continuance of the injunction in case the decree is affirmed by the appellate court, or merely to pay all such damages arising from that cause as should be awarded against the obligors by the judgment of that court. Either reading may be adopted without doing violence to any of the language of the condition.

But when we view the condition in the light of surrounding circumstances, there can be no reasonable doubt as to which of these meanings was within the purpose and intent of the parties. Of these circumstances we may notice, first, the fact that the appellate court had no jurisdiction, whatever might be the outcome of the appeal, to render judgment against the obligors for the damages resulting from the continuance of the injunction. We must attribute to the obligors the intention to enter into an obligation every provision of which would be valid, but if the condition is interpreted as importing an obligation to pay only such damages as should be adjudged by the appellate court, it becomes, so far as that part of it is concerned, merely senseless and nugatory.

Then, again, the circumstances under which the appeal was taken and the bond given point to the conclusion that it was the intention of the obligors to secure to the obligee the payment of the damages growing out of the continuance of the injunction in case the decree should be affirmed. The circuit court had rendered its decree dismissing the bill for want of equity, and dissolving the injunction. The complainants desired to remove the record to the appellate court for review, and to have the injunction continued in force until the final decision of that court. To obtain such continuance of an injunction, a party is ordinarily required to execute to the opposite party a bond indemnifying him against all damages which may thereby result to him. This we think the obligors wished and intended and undertook to do; and

if the bond is equally susceptible of two interpretations, one of which is consistent with and accomplishes that intention, as we think it is, it is very clear that such interpretation must be deemed to be the true one. The undertaking to pay the appellee his damages upon the sole condition that the decree should be affirmed by the appellate court must be held to be within the strict terms of the bond as the obligors made it, and not an obligation imported into it by implication or construction.

One of the assignments of error, which we have not noticed until now, calls in question the decision of the circuit court in sustaining a demurrer to the defendants' second, tenth, twelfth, and eighteenth pleas. The second plea is based upon that interpretation of the bond in question which we have shown is not the true one, and the demurrer to it was therefore properly sustained.

The facts alleged in the tenth and twelfth pleas, so far as they seem to be material, are substantially alleged in other pleas, and the defendants had the advantage of the defenses thereby presented.

The eighteenth plea alleges facts which seem to us to be wholly immaterial, and it was properly held insufficient on demurrer.

We are of the opinion that the judgment of the appellate court should be affirmed, and an order to that effect will accordingly be entered.

**SURETYSHIP — CONSTRUCTION OF CONTRACT OF.** — A contract of suretyship is construed strictly in favor of the surety. He has a right to stand upon the very terms of his contract: *Anderson v. Brilenger*, 87 Ala. 334; 13 Am. St. Rep. 46; *Price v. Dime etc. Bank*, 124 Ill. 317; 7 Am. St. Rep. 367, and extended note; *Wylie v. Hightower*, 74 Tex. 306; *Stewart v. Lewis*, 42 La. Ann. 37; *State v. Findley*, 101 Mo. 368; *John Hancock etc. Ins. Co. v. Lowenberg*, 120 N. Y. 44; *Sanders v. Bagwell*, 32 S. C. 238.

**CONTRACTS — CONSTRUCTION OF, WHERE SUSCEPTIBLE OF TWO MEANINGS.** — That construction of a contract which will make it operative is to be preferred to one which will make it meaningless: *Hughes v. Lane*, 11 Ill. 123; 50 Am. Dec. 436, and note; *Hunter v. Anthony*, 8 Jones, 383; 80 Am. Dec. 333, and note; *Schneider v. Turner*, 130 Ill. 28; *Pendleton v. Saunders*, 19 Or. 2.



## HEALEY v. MUTUAL ACCIDENT ASSOCIATION OF THE NORTHWEST.

[133 ILLINOIS, 555.]

**POLICY OF ACCIDENTAL INSURANCE CONSTRUED WITH REFERENCE TO SUBJECT TO WHICH IT IS APPLIED.** — A policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied.

**INSURANCE POLICY LIBERALLY CONSTRUED IN FAVOR OF INSURED.** — Policies of insurance being signed by, and the language employed being that of, the insurer, their provisions are usually construed most favorably for the insured, in case of doubt or uncertainty in their terms. A policy of insurance must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure.

**DEATH CAUSED BY ACCIDENTALLY TAKING POISON TO BE REGARDED AS CAUSED BY EXTERNAL AND VIOLENT MEANS.** — A death caused by accidentally taking and drinking poison is a death produced by bodily injuries received through external, violent, and accidental means, within the meaning of a policy of insurance providing indemnity in case of death resulting from such causes.

ACTION on a policy of insurance issued by the defendant to the husband of the plaintiff. The defendant interposed a general demurrer to the declaration. The court sustained the demurrer, and the plaintiff electing to stand by the declaration, judgment was rendered against her for costs. This judgment was affirmed by the appellate court, and she appealed to this court. Other facts sufficiently appear from the opinion.

*Miller, Leman, and Chase*, for the plaintiff in error.

*Albert H. Veeder and Mason B. Loomis*, for the defendant in error.

**CRAIG, J.** The question presented, although one of pleading, involves a construction of the policy upon which the action was brought, and in placing a construction on the contract, and in arriving at the intention of the contracting parties, regard must be had to the object and purpose which were intended by the contracting parties. A policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents, and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied: *Rockford Ins. Co. v. Nelson*, 65 Ill. 420. Thus a provision in a policy against loss by fire, avoiding the policy if the property becomes en-

cumbered, has been held not to include encumbrance by judgment, although within the terms used: *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570. Again, policies of insurance being signed by the insurer, the language employed being that of the insurer, the provisions of the policy are usually construed most favorably for the insured in case of doubt or uncertainty in its terms: *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644. "No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted": *May on Insurance*, 2d ed., sec. 175.

Keeping in view these well-settled rules of construction, the question to be determined is, whether the death in this case is one falling within the spirit of the policy.

The death of John Healey, the assured, is a conceded fact; but it is said the policy is an assurance against death by external, violent, and accidental means, and that death did not ensue from external, violent, and accidental means, within the meaning of the policy. Under the averments of the first and second counts, it is manifest that death ensued by accidental means, as it is expressly averred that death was produced by accidentally taking and drinking poison. The demurrer admits this averment of the declaration, and the fact that death ensued from accidental means stands admitted by the record. But to bring the case within the terms of the policy it devolved upon the plaintiff to aver and establish, not only that death ensued from accidental means, but also from external and violent means. The next inquiry, therefore, to be determined is, whether, within the meaning of the policy, death resulted from external and violent means.

While the authorities, in cases similar to the case before us, are not entirely harmonious, yet we think that the decided weight of authority is in support of the view that death in this case was caused by external and violent means. In *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251, 6 Am. St. Rep. 190, the insured was riding in a covered carriage. The horse became frightened, and ran some distance before he could be controlled. In running, the horse came near collision

with other teams, but no collision occurred, nor was the carriage upset or any one injured. However, immediately after the runaway the insured became sick, and died in an hour after the accident. The question arose whether death was caused from bodily injuries through external, violent, and accidental means, within the meaning of the policy, and the court held that it was. In the case cited, the body of the deceased bore no marks of physical injury, nor did the body come in contact with any physical object during the time of the accident, but death no doubt resulted from physical strain and mental shock.

In *Accident Ins. Co. v. Crandal*, 120 U. S. 527, it was held that an insane man who takes his own life dies from an injury produced by external, accidental, and violent means.

In the cases of *Trew v. Assurance Co.*, 5 Hurl. & N. 211 (and, on appeal, 6 Hurl. & N. 839; 7 Jur., N. S., 878), *Reynolds v. Accidental Ins. Co.*, 22 L. T., N. S., 820, and *Winspear v. Accident Ins. Co.*, 42 L. T., N. S., 90 (43 L. J. Rep. 459; affirmed 6 Q. B. Div. 42), it was held that death from drowning was caused by external and violent means, within the meaning of an accident policy.

In the *Trew* case, which may be regarded as a leading one on the subject, it was argued: "Whereas, from the action of the water there is no external injury, death by the action of the water is not within the meaning of the policy." In reply to the argument, the court said: "That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed, or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be, that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give these policies a construction which will defeat the protection of the assured in a large number of cases": *Trew v. Assurance Co.*, 6 Hurl. & N. 843.

In *Paul v. Travelers Ins. Co.*, 112 N. Y. 472, the policy was substantially like the one in question here,—indemnifying against injuries caused by external, violent, and accidental means. The insured died from inhaling illuminating gas. He was stopping at a hotel in New York City. He was found dead in his bed, the room being filled with gas. When found, the deceased lay in his bed, like a man asleep, without any

external or visible signs of injury upon his body. An action on the policy was sustained, and in disposing of the question whether the injuries were caused by external and violent means, the court said: "As to the point raised by the appellant, that the death was not caused by external and violent means, within the meaning of the policy, we think it a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause. The cases collated in the respondent's brief sufficiently establish that as a proposition: *Trew v. Railway etc. Assurance Co.*, 7 Jur., N. S., 878; *Reynolds v. Accidental Ins. Co.*, 22 L. T., N. S., 820; *McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251; 6 Am. St. Rep. 190."

If, as held in the case last cited, death from inhaling poisonous gas is to be regarded as caused by external and violent means, upon the same principle death resulting from the accidental taking of poison must be regarded as resulting from external and violent means. Again, where a person is drowned, having been suffocated by the action of the water in the lungs, if a death in such case is to be regarded as caused or produced by external and violent means, as held in the cases heretofore cited, for the same reason a similar rule must be applied where death resulted as alleged in this case. Here the death arose from accidentally taking and drinking poison, and we are constrained to hold, when such is the case, the injury resulting in death may be regarded as received through violent means. If a person should receive a gunshot wound in the body, resulting in death, it would be conceded that death ensued from violent and external means; for a like reason, poison taken into the stomach, producing death, may also be treated as an external, violent means. Indeed, we are inclined to concur with what was said by the court of appeals of New York, in the case last cited, that where a death is the result of accident, or is unnatural, implies an external and violent agency as the cause.

We have been cited to a few cases holding a different rule: *Hill v. Hartford Accident Ins. Co.*, 22 Hun, 187. This case was overruled by the later case of *Paul v. Travelers Ins. Co.*, 112 N. Y. 472. *Pollock v. United States Mut. A. Ass'n*, 102 Pa. St. 230, 48 Am. Rep. 204, is a case sustaining the position of the defendant; but while we recognize the high ability of the

court in which the case was decided, we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question.

The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings in conformity to this opinion.

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**INSURANCE POLICY, CONSTRUCTION OF.** — For the rules applicable to the construction of policies of insurance, see *National Bank v. Union Ins. Co.*, 88 Cal. 497; 22 Am. St. Rep. 324, and note; *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note 825, 826; *Hoove v. Prescott Ins. Co.*, 84 Mich. 309; *Kenyon v. Knights etc. Ass'n*, 122 N. Y. 247.

**ACCIDENT INSURANCE — WHAT IS A DEATH BY ACCIDENTAL MEANS.** — A death caused by accidentally taking poison is regarded as caused by external and violent means: *Hill v. Hartford Acc. Ins. Co.*, 22 Hun, 187, cited in note to *Paul v. Travelers Ins. Co.*, 8 Am. St. Rep. 765. Compare *Richards v. Travelers Ins. Co.*, 89 Cal. 170; *ante*, p. 455, and note; *Bacon v. United States etc. Ass'n*, 123 N. Y. 304; 20 Am. St. Rep. 748, and note.

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## AMERICAN EXPRESS COMPANY v. PEOPLE.

[126 ILLINOIS, 642.]

**GAME LAWS, POWER OF LEGISLATURE TO ENACT, IN EXERCISE OF POLICE POWER.** — A state legislature has power to enact laws for the preservation of game in the state, and the constitutionality of such legislation cannot be questioned. The power to legislate on this subject is part of the police power inherent in each state.

**OWNERSHIP OF GAME IS IN PEOPLE OF STATE.** — The ownership of game is in the people of the state, and the legislature may withhold from or grant to individuals the right to hunt and kill game, or qualify and restrict such right, as, in its opinion, will best subserve the public welfare.

**NO ABSOLUTE OWNERSHIP IN DEAD GAME, UNLESS GIVEN BY LEGISLATURE.** — The legislature has the right to permit persons to kill or take game upon such terms and conditions as its wisdom may dictate; and persons permitted to kill game have only such property interest in it, when killed, as the legislature may confer upon them. Persons permitted by law to kill, but not to sell, game have only a qualified property in it after it is killed. They may use it themselves, but cannot lawfully sell it to others.

**ACT FOR PRESERVATION OF GAME, CONSTRUCTION OF.** — Where one section of an act for the preservation of game prohibits the taking or killing of game between the first day of December and the first day of October of each year, but is silent as to October and November, and a subsequent section, VOL. XXIII — 41

quent section of the act makes it unlawful for any person to sell or expose for sale any game killed within the limits of the state, a person may lawfully kill game for his own use, but not for sale, during the months of October and November.

**CARRIERS TRANSPORTING GAME LIABLE TO PENALTY WHEN.** — The legislature may enact a statute making it unlawful for any carrier to transport game killed in the state, knowing the same to have been sold, or knowing that it is to be sold or offered for sale; and any carrier transporting game in violation of such statute will be amenable to the penalty prescribed thereby.

**ACTION to recover a penalty.** The opinion states the case.

*Wood Brothers, and Rinehart and Wright*, for the appellant.

*R. C. Harrah*, for the people.

**CRAIG, J.** This was an action to recover the penalties prescribed for the unlawful transportation of quail, in section 2 of "An act to amend sections 1, 2, and 6 of an act to revise and consolidate the several acts relating to the protection of game, and for the protection of deer, wild fowl, and birds": Laws of 1889, p. 161.

The facts agreed upon by the parties on the trial of the cause were, in substance, as follows: That the defendant, the American Express Company, is a corporation, and carrier of goods for hire; that between October 1 and October 23, 1889, it received for transportation, from Redding, Gibbs, and others, at Mason, in Effingham County, divers quail, which had been killed by shooting after October 1, 1889, in this state, and on October 23, 1889, the express company did transport such quail to Chicago, and deliver them to Hernse and Lynch Brothers, commission merchants; that the express company, at the time of such receipt for transportation, by its agent (Sisson) at Mason, had knowledge that the quail had been sold, and were to be sold, or offered for sale, by said commission merchants.

Section 1 of the act provides "that it shall be unlawful for any person to hunt, kill, trap, net, or ensnare, or otherwise destroy, . . . any ruffed grouse, quail, pheasant, or partridge between the first day of December and the first day of October of each succeeding year, or any year." Section 2 provides: "It shall be unlawful for any person to buy, sell, or have in possession any of the animals, wild fowl, or birds mentioned in section 1 of this act, at any time when the trapping, netting, or ensnaring of such animals, wild fowl, or birds shall be unlawful, which shall have been entrapped,

netted, or ensnared contrary to the provisions of this act; and it shall further be unlawful for any person or persons, at any time, to sell or expose for sale, or to have in his or their possession for the purpose of selling, any quail, pinnated grouse or prairie chicken, ruffed grouse or pheasant, gray, red fox, or black squirrel, or wild turkey, that shall have been caught, snared, trapped, or killed within the limits of this state; and it shall further be unlawful for any person, corporation, or carrier to receive for transportation, to transport, carry, or convey, any of the aforesaid quail, pinnated grouse or prairie chicken, ruffed grouse or pheasant, squirrel, or wild turkey, that shall have been caught, snared, trapped, or killed within the limits of this state, knowing the same to have been sold, or to transport, carry, or convey the same to any place where it is to be sold or offered for sale, or to any place outside of this state, for any purpose."

It is plain, under the facts as agreed upon, the express company received the quail for transportation, and transported the same, knowing the quail were sold or transported for the purpose of sale, in violation of the terms of the statute; and if the statute is valid, the company was liable for the amount of the penalty provided by its terms and provisions. But it is insisted by the express company that the statute is invalid, and upon this ground the judgment rendered in the county court was erroneous.

It will be observed that the first section of the act makes it unlawful to hunt or kill quail between the first day of December and the first day of October of each year; but the section is silent as to October and November. It would follow, therefore, that a person might hunt or kill quail during the months of October and November,—not, however, for sale, but under the restrictions found in section 2 of the act. The first clause of section 2 makes it unlawful for any person to buy, sell, or have in possession any of the birds named in section 1 of the act, at any time when the trapping, etc., of such animals shall be unlawful. The second clause makes it unlawful for any person to sell or expose for sale, or have in possession for the purpose of sale, any quail that shall have been killed within the limits of this state. Under this clause, while a person might lawfully kill quail during the months of October and November for his own use, he would have no right whatever to do so for the purpose of placing

such quail on the market as an article of commerce. Then follows the clause making it unlawful for any person, corporation, or carrier to transport quail, when the same have been killed in this state, for sale, regardless of the time such quail may have been killed.

A bare reference to the terms of sections 1 and 2 of the act is sufficient to show that the purpose the legislature had in view in passing the act was to protect the game in the state. The hunting and killing of game was regulated, for its preservation, by the common law, and the control was predicated under the police power of the government: 4 Bla. Com. 174. Statutes in almost every state in the Union may be found enacted for the preservation of game. The text-writers, in treating of the power to legislate on this subject, place it under the police power inherent in each state. Tiedeman, in his *Limitations of Police Power* (sec. 122, c. 10, p. 440), says: "It is a very common police regulation, to be found in every state, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination, by providing them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned."

In *Phelps v. Racy*, 60 N. Y. 10, 19 Am. Rep. 140, the power of the state to legislate for the preservation of game was called in question, and in deciding the case, the court said: "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body." See also *Allen v. Wyckoff*, 48 N. J. L. 93; 57 Am. Rep. 548.

In *Magner v. People*, 97 Ill. 333, the validity of the game law of 1879, to which the act in dispute is amendatory, was before this court, and it was there said: "The ownership being in the people of the state, — the repository of the sovereign authority, — and no individual having any property rights to be affected, it necessarily results that the legislature,



as the representatives of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare."

It is, however, argued that where quail have been killed, the dead animals become property, and the taker becomes the absolute owner of such property, and an act to prevent a sale or transportation for sale within the state would be an interference with private right, amounting to a destruction of the right of property without due process of law. The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner case, supra*, it was held, as has been seen, that no one has a property in animals and fowls denominated game, — the ownership was in the people of the state. This being so, it necessarily followed that the legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the legislature might confer. The legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail during the months of October and November was permitted, not for sale, — not to go upon the market as an article of commerce, — but for the mere use of the person who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale, and when such person undertakes to ship for sale he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists.

It will be observed that section 2 of the act does not prohibit absolutely the transportation of quail which have been killed in the state, but only transportation by persons, corporations, and carriers knowing the same to have been sold, or knowing they were to be sold or offered for sale. If the legislature of the state thought that a statute preventing a citizen from killing quail for sale in the market, and imposing a penalty on a common carrier for shipping or transporting for

sale, would result in protecting the game in the state, we perceive no valid reason why a statute of that character might not be enacted. The nature and character of the legislation was a matter resting solely with the legislature, and so long as no constitutional right of the citizen has been infringed upon, the statute must be sustained.

The judgment of the county court will be affirmed.

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**CARRIERS — TRANSPORTATION OF GAME KILLED IN VIOLATION OF LAW.** — The Maine statute imposing a penalty for killing, destroying, or having in possession during certain seasons "more than one moose, two caribow, or three deer" does not apply to carriers in the performance of their duties: *Bennett v. American Ex. Co.*, 83 Me. 238, *post*, p. 774.

**ANIMALS FERÆ NATURÆ, PROPERTY IN.** — As to the ownership of animals *feræ naturæ*, see note to *Wheatley v. Harris*, 70 Am. Dec. 259; *Pirsson v. Post*, 3 Caines, 175; 2 Am. Dec. 264, and note; *Sterling v. Jackson*, 69 Mich. 488; 13 Am. St. Rep. 403, and note.

**GAME LAWS — POWER OF LEGISLATURE.** — The legislature has power to pass laws for the preservation of game: *Phelps v. Rucey*, 60 N. Y. 10; 19 Am. Rep. 140.

**GAME LAWS — GAME KILLED IN ANOTHER STATE.** — A statute punishing any one who, in Massachusetts, takes or kills woodcock, etc., between specified days, or buys, sells, offers for sale, or has them in possession within the same time, does not apply to such birds lawfully taken or killed in another state: *Commonwealth v. Hall*, 128 Mass. 410; 35 Am. Rep. 387, and note 390, 391; *Commonwealth v. Wilkinson*, 139 Pa. St. 298.

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## SMITH v. HUNTOON.

[134 ILLINOIS, 24.]

**EXECUTION SALE.** — A JUDGMENT CREDITOR PURCHASING AT AN EXECUTION SALE IS CHARGEABLE with notice of all irregularities in the proceedings.

**EXECUTION SALE EN MASSE**, when the property sold is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular, and the sale will be set aside in equity.

**EXECUTION SALE.** — WHILE GROSS INADEQUACY OF PRICE ALONE is not sufficient to avoid a sale under judicial process, it will, when conjoined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition.

**EXECUTION SALE.** — ASSIGNEES OF THE CERTIFICATE OF A SALE MADE TO THE PLAINTIFF occupy the position which he occupied, and are affected by irregularities by which he is affected. Especially are they chargeable with notice of all matters which they might have ascertained by examining the proceedings and public records upon which their title rested.

**BILL** in equity by Smith against Huntoon, Morrison, and Whitlock to set aside a sale made by the sheriff, and his deed

executed in pursuance thereof. The bill, after stating the plaintiff's ownership of an undivided one fifth of certain real property in August, 1855, alleged that a writ of attachment was sued out by Huntoon against plaintiff, based upon the affidavit of Huntoon that plaintiff was justly indebted to him in the sum of \$46.67, after allowing all just credits, and that plaintiff was not a resident of Illinois, but resided at Pueblo, Colorado; that this statement of plaintiff's residence was false in this, that his residence was then at Alamosa, Colorado, which fact Huntoon could have ascertained by inquiry; that plaintiff had no notice of the attachment proceedings until after the expiration of the time in which he could redeem his property from a sale thereunder; that the judgment in the attachment proceedings was for \$46.67 damages, and \$14.50 costs; that under a special execution issued thereon the sheriff sold *en masse* all the plaintiff's estate in the undivided one-fifth part of 160 acres of land described in the bill, without offering to sell it in smaller lots or subdivisions; that such sale was made to Huntoon for the sum of \$71.65, while the interest of the plaintiff in the land was, at the time of sale, worth \$1,500; that after the sale, the defendants Morrison and Whitlock purchased for \$71.65 the certificate of sale issued by the sheriff to Huntoon; that on January 26, 1887, the sheriff's deed issued to them as assignees of such certificate, and that they knew that at the time of the sale that plaintiff's interest was worth \$1,500. Plaintiff further claimed that if he was indebted to Huntoon at all, that the claim was barred by the statute of limitations prior to the commencement of the attachment suit, and that he had tendered to Morrison and Whitlock the amount paid by them, together with interest thereon from the day of the sale, computed at the rate of six per cent per annum. Plaintiff further offered to pay whatever may be found equitably due, and asked to have the deed set aside and declared void. A demurrer to the bill was sustained and the bill dismissed, and thereupon the complainant prosecuted this appeal.

*John W. Springer*, for the appellant.

*Morrison and Whitlock*, for the appellees.

BAKER, J. We are of the opinion that the court erred in sustaining the demurrer to the bill of complainant. If the certificate of purchase had remained in the hands of the judgment creditor, Huntoon, no question could have arisen but

what he would have been chargeable with notice of the irregularities in making the sale of complainant's land alleged in the bill. It has been so repeatedly held that where the judgment creditor becomes the purchaser he is chargeable with notice of all irregularities, that we do not deem it necessary to enter into a discussion of that question: *Stewart v. Croes*, 5 Gilm. 442; *Morris v. Robey*, 73 Ill. 462, and cases cited.

The bill alleges that the property sold was of the value of \$1,500 at the time of the sale, and that it was sold *en masse* for \$71.65, without having been offered in smaller tracts. It is manifest that the interest of the complainant in a much smaller division of this 160 acres of land would have been ample to satisfy the special execution. In *Stewart v. Croes*, 5 Gilm. 442, which was a like bill, the allegation was that the land was of the value of one thousand dollars at the time of the filing of the bill, and the court said: "Had there been an allegation that the land was worth one thousand dollars at the time of sale, instead of at the time of filing the bill, such allegation, in connection with the other statements in the bill, would have presented a clear case for the interposition of a court of equity, for it would never be allowable for an officer to sell, *en masse*, a tract of land worth one thousand dollars, to satisfy an execution for less than thirty dollars, when the tract was susceptible of division, and the sale of a small part would have satisfied the debt." See also *Day v. Graham*, 1 Gilm. 435; *Cowen v. Underwood*, 16 Ill. 22; *Ballance v. Loomis*, 22 Ill. 82; *Phelps v. Conover*, 25 Ill. 312; *Davis, Cory, & Co. v. Chicago Dock Co.*, 129 Ill. 180, and cases there cited.

We held in *Phelps v. Conover*, 25 Ill. 312, that while the plaintiff in execution has a right to insist upon a sale for the satisfaction of his debt, the debtor also has the right to demand that the sale shall be conducted according to law, and in such a manner as shall not needlessly sacrifice his property. A sale made, therefore, *en masse*, where the property is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular. The creditor may insist that his debt shall be paid, but where a needless sacrifice is made of the debtor's property, an unconscionable advantage is taken of the debtor, not warranted by law, "which circumstance," as said in *Morris v. Robey*, 73 Ill. 462, "with gross inadequacy of price, is at least impliedly recognized as ground of equitable relief in a number of cases"; citing *McMullen v. Gable*, 47 Ill. 71, and *Mixer v. Sibley*, 53 Ill. 75.

Moreover, it is alleged that the affidavit for the attachment stated the residence of the defendant therein upon information only, and that an untrue residence was given. It is required by the attachment act that the affidavit for attachment shall state the residence of the defendant, "if known, and if not known, that, upon diligent inquiry, the affiant has not been able to ascertain the same." By section 22 of the act, the clerk is required to send a copy of the notice by mail, addressed to the defendant at the place of residence stated in the affidavit. We do not propose now to determine the effect of this last-mentioned irregularity. It must be manifest, whatever the effect, that the affidavit was not in compliance with the statute, and that no copy of the notice published by the clerk would have reached the defendant at the place designated in the affidavit, and that the purpose of the statute in requiring the mailing of notice was defeated. The statute seems to contemplate that if the residence is not known, diligent inquiry should be made to ascertain the same; and if it be true, as alleged in the bill, that Huntoon could have ascertained the same upon inquiry, it was his duty to do so. By the course pursued, gross fraud might be perpetrated upon a defendant, and his property unjustly subjected to sale without notice to him.

It is alleged that Huntoon and Morrison and Whitlock knew that the land was of the value of fifteen hundred dollars at the time of the sale and of the transfer of the certificate of purchase. Without further noting the irregularities alleged in the bill, it must be said that those already mentioned, when taken in connection with the gross inadequacy of price, make a case such as would require an answer, at least on the part of Huntoon, were he still the real party in interest. Although gross inadequacy of price alone will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition: See *Davis, Cory, & Co. v. Chicago Dock Co.*, 129 Ill. 180; *Hamilton v. Quimby*, 46 Ill. 90; *Comstock v. Purple*, 49 Ill. 158.

The point is relied upon that Morrison and Whitlock are *bona fide* purchasers, and are to be protected as such, and that although the plaintiff in execution is chargeable with notice of irregularities in the proceedings, they are not so chargeable. It is said there is no allegation of notice to

them of such irregularities. It is alleged that they had notice of the value of the land. It is not necessary for us here to determine the estate or interest which the holder of the certificate of purchase acquires by virtue of the sale and certificate. Whatever right Huntoon had, and no more, passed by the assignment to Morrison and Whitlock. They occupy the position that he occupied, and stand precisely where he stood. The rule that applies to strangers purchasing at judicial sales, or to a purchaser in good faith and for value from one who has acquired title under a judicial sale, can have no application to them. The policy of the rule which protects strangers is to encourage bidding at judicial sales, and prevent the loss of money by strangers who bid upon the faith of the correctness of judicial proceedings, and where there is little opportunity to inquire into their regularity or irregularity. Morrison and Whitlock are mere volunteers, who paid the amount of the bid to the plaintiff in execution, and took an assignment of his certificate. The rule which applies to the assignee of a certificate of purchase issued to a plaintiff in execution is that which applies to the plaintiff in execution himself. A grantee is charged with notice of the deeds and documents through which he derails title. So here, Morrison and Whitlock, when they purchased from Huntoon his inchoate right, must be presumed to have known the course of proceedings through which he proposed deriving title, and to have known what was shown by the public records in respect thereof. By looking at the return of the sheriff on the special execution mentioned, they would have seen that a one-fifth interest in 160 acres of land, which it is alleged they knew was worth \$1,500, had been sold for \$71.65, *en masse*, and without any portion of it having been offered in less quantity. By reference to the files in the case, they would have observed a palpable non-compliance with the law, through which gross fraud might be perpetrated upon the defendant. They stand, as before said, in the shoes of Huntoon, and succeed to all his rights, but none other, and the certificate in their hands is charged with all the infirmities which existed against it while in the hands of Huntoon: *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Turner v. First Nat. Bank*, 78 Ind. 19; *Ayres v. Campbell*, 9 Iowa, 213; *Herman on Executions*, 435.

The bill of appellant is inartificially drawn, and in many respects might well be amended, but we are of opinion it

shows substantial grounds for equitable relief, and the decree dismissing the bill will be reversed, and the cause remanded for further proceedings.

Decree reversed.

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IT IS SOMEWHAT REMARKABLE that the relief in the principal case was based partly upon the ground that the sale of the complainant's property ought not to have been made *en masse*, when, as the records show, such property consisted of 160 acres of land, in which the interest of the complainant was only an undivided one fifth. Had the officer who conducted the sale complained of undertaken to sell the interest of the complainant in any segregated part of this land, his course would have been liable to serious objection, and might well have met with the disapproval of any court to which it was presented for consideration. It is well known that a co-tenant has no power or authority to make a conveyance of a segregated part of the lands of the co-tenancy which may not be disregarded by his co-tenants. If an officer levying an execution upon the interest of a tenant in common in a tract of land should designate some particular subdivision thereof, and limit the levy and sale to the interest of the co-tenant in that subdivision, it would be doubtful whether the purchaser could acquire anything by the sale, and certainly whatever right he might acquire could be entirely destroyed by subsequent partition of the tract in which the share belonging to the judgment debtor should be set apart to him in an entirely different portion of the land from that purchased at the execution sale. In those states where the practice is to extend lands under execution, the officer, if the share of the debtor is more than sufficient to satisfy the execution, may levy upon such undivided portion of such share as shall be determined by the appraisers, and can in no event limit the extent to the interest of the debtor in some segregated portion of the lands. With respect to involuntary transfers of real estate by extent or by sale under execution, there are a few authorities which seem to sustain the transfer of a co-tenant's interest in a specific part by metes and bounds, except as against the objection of the defendant's co-tenants: *Godwin v. Gregg*, 28 Me. 183; 48 Am. Dec. 489; *Hove v. Blanden*, 21 Vt. 315. But in a decided majority of the cases the rule has been held otherwise, and extent of the lands of a co-tenant have been held void, unless they embraced an undivided portion of all the land, and not a part by metes and bounds: *Bartlet v. Harlow*, 12 Mass. 348; *Gregory v. Tozier*, 24 Me. 306; *Peabody v. Minor*, 24 Pick. 329; *Starr v. Leavitt*, 2 Conn. 243; 7 Am. Dec. 268; *French v. Lund*, 1 N. H. 42; 8 Am. Dec. 31; *Smith v. Knight*, 20 N. H. 9; *Hymas v. Leavenworth*, 2 Conn. 244; *Brown v. Clifford*, 38 Me. 210; *Hilton v. Hanson*, 18 Me. 397; *Merrill v. Burbank*, 23 Me. 538; *Galusha v. Sinclear*, 3 Vt. 394; *Smith v. Benson*, 9 Vt. 133; 31 Am. Dec. 614; *Baldwin v. Whiting*, 13 Mass. 87. In New Hampshire, this rule has been enforced where the defendant was a co-tenant of several distinct parcels of real estate, and it was held that the extent must be upon an undivided part of each parcel: *Thompson v. Barber*, 12 N. H. 563. On the other hand, it has been determined in Connecticut that where a debtor is a co-tenant of several distinct parcels of land held by distinct co-tenancies, the officer must not extend an undivided interest in the whole, unless the debtor's entire interest in all the tracts is needed to satisfy the writ; that the officer must extend the debtor's entire interest in some one tract, and if this proves insufficient, he must then pro-

ceed to extend some other tract: *Starr v. Leavitt*, 2 Conn. 243; 7 Am. Dec. 268. A levy upon and extending of the lands of a co-tenant, as though he were seised of an estate in severalty, will pass his interest, if the creditor should so elect: *Davis v. Barnard*, 60 N. H. 550; *Oose Bank v. Brooks*, 2 N. H. 148; *Bartlet v. Harlow*, 12 Mass. 348; *Atkins v. Bean*, 14 Mass. 404.

## HRONEK v. PEOPLE.

[124 ILLINOIS, 139.]

**CONSTITUTIONAL LAW.**—Two distinct subjects are not expressed in the title of a statute entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same." The regulation of such use necessarily implies the right to punish an improper use.

**CONSTITUTIONAL LAW.**—THE TITLE OF AN ACT NEED NOT EXPRESS ALL OF THE MINOR DIVISIONS OF THE GENERAL SUBJECT to which the act relates. It is sufficient that it expresses the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it.

**CONSTITUTIONAL LAW.**—THE TITLE OF AN ACT DOES NOT EXPRESS MORE THAN ONE SUBJECT, when it, in addition to the general subject, expresses a minor subdivision which, without such expression, would be held to be included within the general subject.

**CONSTITUTIONAL LAW.**—A STATUTE DOES NOT TREAT OF TWO SEPARATE SUBJECTS because one part relates to the manufacture and sale of explosives for illegal purposes, and the other part to their manufacture, sale, and transportation for legitimate purposes.

**IMPRISONMENT IN THE PENITENTIARY IS AUTHORIZED** by a statute declaring that certain acts shall be deemed felonies, and punished by imprisonment for a term not less than five nor more than twenty-five years, while a general statute declares that a felony is an offense punishable by death or confinement in the penitentiary.

**CRIMINAL PRACTICE.**—VERDICT FINDING DEFENDANT GUILTY, BUT NOT MENTIONING HIS NAME, is sufficient, though three defendants are included in the same indictment, if the record shows that but one of them was put upon trial.

**CRIMINAL LAW.**—ACCESSARY BEFORE THE FACT MAY BE INDICTED AS A PRINCIPAL, when the statute under which he is prosecuted provides that every person abetting or in any way assisting in certain specified acts shall be deemed a principal.

**JURY TRIAL.**—INSTRUCTION THAT THE EVIDENCE OF A PRIVATE DETECTIVE AND OF THE POLICE should be received with a large degree of caution is properly refused, because it is for the jury to determine from all the circumstances connected with the witness the weight and credit to be given his testimony.

**WITNESS, RELIGIOUS BELIEF OF.**—Any person is made competent to be a witness, notwithstanding his religious belief, or want of belief, by a provision in the state constitution, as follows: "No person shall be denied any civil or political privilege, right, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall



not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state."

**CRIMINAL LAW—PRESUMPTIONS OF GUILT.**—If a person who is found in possession of explosives has avowed his intention to use them for a particular unlawful purpose, the presumption arises that he procured them for such unlawful use, especially if there was nothing in his business requiring him to have or to use such explosives.

*Julius Goldzier*, for the plaintiff in error.

*George Hunt*, attorney-general, for the people.

**BAKER, J.** The plaintiff in error, John Hronek, was indicted, with Frank Chapek, Frank Chleboun, and Rudolph Sevic, for violation of an act of the legislature of this state, entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, and in force July 1, 1887. The first count charged the defendants with unlawfully making dynamite with the unlawful intention of destroying the lives of certain persons therein named, and in the five remaining counts the defendants were charged successively in such several counts with manufacturing, compounding, buying, selling, and procuring dynamite, with the same unlawful purpose and intent. The defendant Hronek was alone put upon trial, and that trial resulted in a verdict of guilty, and fixing his punishment at twelve years' imprisonment in the penitentiary. Motions for a new trial and in arrest of judgment were severally overruled, and the said defendant was sentenced on the verdict. Numerous grounds are urged for reversal, which we shall consider substantially in the order they are made.

It is insisted that the statute upon which the prosecution is based is unconstitutional, in that it is obnoxious to section 13 of article 4 of the constitution of the state, which provides "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The specific objection is made that two distinct subjects are expressed in the title. That objection is without merit. The act is entitled "An act to regulate the manufacture, transportation, use, and sale of explosives, and to punish an improper use of the same." The regulation of the use necessarily implies the right to punish an improper use. To "regulate" means to adjust by rule or regulation, and any attempt to fix rules for the manufacture, transportation, use,

and sale of explosives that did not also prescribe punishment for violation of such rules and regulations would necessarily be imperfect. Two different subjects are not included or expressed in or by the title, for the punishment of an improper use flows necessarily and legitimately from the main or substantive object as stated in the title,—i. e., to regulate the use, etc., of explosives. It is not necessary that the title shall express all of the minor divisions of the general subject to which the act relates, and it is sufficient if it express the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it. But if the title expresses such minor subdivisions, which, without such expression, would be held to be included within the general subject, such expression will not render the title obnoxious to the constitutional provision: *Plummer v. People*, 74 Ill. 361; *Fuller v. People*, 92 Ill. 182; *Magner v. People*, 97 Ill. 320; *Cole v. Hall*, 103 Ill. 30; *Prescott v. City of Chicago*, 60 Ill. 121; *Potwin v. Johnson*, 108 Ill. 71; *Timm v. Harrison*, 109 Ill. 593; *Hawthorn v. People*, 109 Ill. 302; 50 Am. Rep. 610; *People v. Wright*, 70 Ill. 389; *City of Virden v. Allan*, 107 Ill. 505.

The contention that the statute itself treats of two separate and well-defined subjects is not tenable. It is said that the first three sections of the act relate to the "manufacture and use of explosives for illegal purposes," while the four remaining sections relate to "the manufacturing, sale, and transportation of explosives for legitimate purposes." It is therefore claimed that the former should properly be found in the Criminal Code, and are not germane to the other sections of the act, which are mere police regulations. The general subject of the statute is the manufacture, transportation, use, and sale of explosives; and it cannot be said because one section provides for a license or permit to be obtained for their manufacture, and another prohibits the storing of explosives within a certain distance of inhabited dwellings, and another punishes fraudulent acts to procure the transportation of explosives in public conveyances, that still another section or other sections making it unlawful to manufacture or procure such explosives with the intent to use the same for unlawful destruction of life or property, and affixing a penalty therefor, would not be within the same general subject of legislation. It can no more be said that the prohibition, under a penalty, against storing explosives in dangerous proximity to a dwell-

ing is a police regulation, than that a like prohibition against manufacturing or procuring the same for an unlawful use or purpose is a police regulation. All of the provisions of the act are within the subject expressed in the title, and are germane to each other and to the general scope and purpose of the act.

It is next claimed that the sections of the statute under which this indictment was prosecuted are not sufficiently definite to authorize imprisonment in the penitentiary. Section 1 of the act provides that whoever shall be guilty of the acts therein denounced "shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not less than five years nor more than twenty-five years." It is urged that as it is not stated the imprisonment shall be in the penitentiary, and the statute is highly penal, and requires strict construction, a sentence thereunder to the penitentiary cannot be sustained. We are not prepared to adopt this view. The offense is, by the act, declared to be a felony. A felony is, by the Criminal Code of the state, declared to be an offense punishable by death or confinement in the penitentiary. While the legislature undoubtedly may provide for the punishment of misdemeanors by imprisonment in the penitentiary, and undoubtedly might, if they saw proper, punish felonies otherwise than by imprisonment in the penitentiary, yet there is nothing in these sections of the act which indicates an intention to do the latter. Applying the well-known rule that a criminal statute is to be strictly construed, and that nothing is to be taken by intendment or implication against the accused beyond the literal and obvious meaning of the statute, it is nevertheless clear, we think, when this statute is considered in connection with the general Criminal Code, which it must be presumed the legislature had in contemplation when passing it, the punishment to be inflicted for violation of said sections of the act is by imprisonment in the penitentiary.

It is insisted that the verdict is void for uncertainty, in that it simply finds "the defendant" guilty, without specifying the plaintiff in error by name. Before plaintiff in error was put upon trial, a separate trial had been awarded to the defendants Chapek and Sevic. The defendant Chleboun was not put upon trial, but was used as a witness on behalf of the people. The record shows that on the twenty-sixth day of November, 1888, at the term of the criminal court then being

held, the following proceedings were had and entered of record, to wit:—

*"The People of the State of Illinois v. John Hronek, impl., etc.*

"This day come the said people, by Joel M. Longenecker, state's attorney; and the said defendant, as well in his own proper person as by his counsel, also comes. And now, issue being joined, it is ordered that a jury come," etc. (Then follows the impaneling of a jury.)

It is manifest from the foregoing that no one was put upon trial other than the defendant Hronek, and the verdict finding "the defendant" guilty could not refer to any other defendant. There was no uncertainty in the verdict.

Complaint is made of the second instruction given on behalf of the people. That instruction told the jury that any person abetting or assisting in the perpetration of the offense mentioned in section 1 of the act was, upon conviction, to be punished as provided in said first section. This was not error. The statute provides that any person abetting or in any way assisting in making, manufacturing, buying, procuring, etc., such explosives, etc., knowing or having reason to believe that the same are intended to be used by any person or persons, in any way, for the unlawful injury to or destruction of life or property, shall be deemed principal, and upon conviction shall be subject to the same punishment as provided in section 1 of the act. Under this statute, a defendant, if guilty as an accessory before the fact, is to be indicted and punished as principal. In view of the evidence tending to show the connection of plaintiff in error with the other defendants in the perpetration of the offense, the instruction was entirely proper.

It is objected that the court erred in refusing an instruction that the evidence of private detectives and of the police "should be received with a large degree of caution." This instruction does not contain a correct proposition of law. All the circumstances connected with a witness, or that might tend to affect his credibility or bias his judgment, are competent to be shown to and considered by the jury in determining the weight and credit to be given to his testimony. In view of the facts and circumstances thus shown, it is for the jury to determine its weight as matter of fact.

It is urged that the court erred in modifying an instruction asked by the defendant. The instruction, as asked, was as follows:—

"The jury are instructed that to constitute the crime charged against the defendant in the indictment, two things are necessary, namely: First, the making, manufacturing, compounding, buying, selling, or disposing of the dynamite, or some portion thereof, described in the indictment, on or subsequent to the first day of July, A. D. 1887."

To this the court added the following: "Therefore the jury must disregard any evidence as to the making or compounding or procuring of any dynamite, at Chapek's house or elsewhere, prior to said date." The instruction then proceeds: "Second," etc.

Hronek's defense, in part, consisted in accounting for the dynamite found in his possession by testifying that it was left in his house in the fall of 1886 by one Karafiat, and it became important for the jury to consider testimony tending to show that he was in possession of dynamite in the spring of 1887, prior to the law under which he was prosecuted going into effect on the first day of July of that year. It is insisted that the effect of the modification was to take from the consideration of the jury this evidence, offered by the defendant, of prior possession of the explosives. It is conceded that such was not the purpose, and it is clear to us that such was not the effect, of the modification. The instruction related solely to the elements necessary to constitute the crime charged. The jury were told that to constitute the crime it was necessary that the making, etc., of the dynamite must have been on or subsequent to the first day of July, 1887, and that therefore the jury must disregard the making or procuring, etc., prior to that date. It must be presumed that the jury were men of reasonable intelligence, and would understand that what followed the introductory part of the instruction related to what was necessary to constitute the crime, and not to the defense set up, that the dynamite was in possession of the defendant prior to the date fixed by the instruction. Moreover, the jury, by a lengthy series of instructions, were fairly instructed as to the law of the case, fully as favorably to the defendant as he could rightfully ask. They were told that they must consider all the facts and circumstances proven, and determine therefrom whether the defendant procured, etc., the explosives in question after the law went into force, and that his possession prior thereto would raise no presumption of guilt. It is, we think, impossible that the jury could have been misled, to the prejudice of the plaintiff in error, by the modification.

It is not contended that the instruction, when considered as defining what would constitute guilt of the crime charged, and what the jury might properly consider in respect thereof, is not a substantially accurate statement of the law. As the jury were not misled by the modification, to the prejudice of the plaintiff in error, he has no cause of complaint.

Objection is made to the competency of Frank Chleboun, a witness for the people, who was permitted to testify, over the objection of the defendant. He was examined upon his *voir dire*, and avowed his belief in the existence of God and "a hereafter"; that he believed if he swore falsely he would be punished under the criminal laws of the state; that he had never thought seriously of whether God would punish him, either in this world or the next, and had never considered the question whether he would be punished for false swearing in any other way than by that inflicted by the law. He had, it seems, no religious belief or conviction of his accountability to the Supreme Being, either in this world or in any after-life. The test of the competency of a witness in respect to religious belief, as generally held, is, Does the witness believe in God, and that he will punish him if he swears falsely? It is stated by Rapalje, in his *Law of Witnesses* (sec. 11), that "the great weight of authority, in this country, now is, that it is immaterial whether the witness believes God's vengeance will overtake him before or after death." This doctrine was approved in *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541, where, after a consideration of the authorities, it was held that all persons are competent to be sworn as witnesses who believe there is a God, and that he will punish them, either in this world or in the next, if they swear falsely; and that a want of such belief rendered them incompetent to take an oath as witnesses. This case seemingly overruled the doctrine of the earlier case of *Noble v. People*, Beecher's Breese, 54. Without pausing here to determine whether the court erred in subjecting the witness to an examination touching his religious belief (Rapalje on Witnesses, sec. 12, and cases cited), it may be said that the better practice, and that which now prevails, forbids the examination of the witness in respect thereof on his *voir dire*. If there was error in this regard, it was committed at the instance of the defendant, and in his interest, and he cannot complain.

Returning to the question of the competency of the witness,

the rule seems to be as above stated, unless changed by constitutional provision or legislative enactment. The tendency of modern times, by the courts and in legislation, is towards liberalizing the rule, and in many jurisdictions incompetency for the want of religious belief has been abolished: See *Rapalje on Witnesses*, sec. 13; *Wharton on Evidence*, sec. 395.

Has the rule announced by this court in *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541, been changed in this state? By section 3 of article 2 of the constitution of 1870, it would seem that a radical change was effected in respect to the matter under consideration. This section guarantees non-interference of the state with the religious faith of its citizens. In *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, it was said: "The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the state shall not be justified." The section provides: "No person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state." No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief. The liberty of conscience secured by the constitution is not to be construed as dispensing with oaths or affirmations in cases where the same are required by law. No man, because of his religious belief, is to be held to be excused from taking the prescribed oath of office before entering upon the discharge of the public duty; nor can he be permitted to testify, because of such religious belief or opinion, except upon taking the oath or making the affirmation required by law. Now, as before the adoption of this provision, oaths are to be taken and affirmations made whenever required by law, but the right to take such oath or make such affirmation, if such right be a civil right, privilege, or capacity, cannot be denied to any citizen.

It is said that one who holds proscribed religious opinions is incompetent,—that is, has not the legal capacity to testify. The incapacity, if it exists, grows out of and is based upon his failure to hold certain religious beliefs and opinions in accord with the prevailing religious opinions of the people,

and the contention is, that he should not, by reason of such incapacity, be permitted to testify, however great and important the interest at stake to himself, his family, his neighbor, or the state. It is clear, from the authorities, that the rule contended for does not apply when the witness is testifying in his own behalf; but if the life, liberty, reputation, or property of his family or neighbor be involved, or his testimony be necessary to the protection of society, he is, under such rule, to be excluded from the privilege of testifying in courts of justice because of such incapacity. If it exists at all, the incapacity is created by law, and it is therefore a civil incapacity. The constitution provides that no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions. In Bouvier's Law Dictionary, capacity is defined to be "ability; power; qualification or competency of persons, natural or artificial, for the performance of civil acts depending on their state and condition as defined or fixed by law." It is also defined as follows: "Power; competency; qualification; ability; power or qualification to do certain acts": Am. & Eng. Ency. of Law.

The obvious meaning of the provision in the constitution is, that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens, generally, shall not be taken from or denied to any person on account of his religious opinions. As said by the court of appeals of Kentucky, in construing a similar provision of the constitution of that state, in *Bush v. Commonwealth*, 80 Ky. 244: "It is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain certain opinions in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief." It is manifest that if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction. In *Perry v. Commonwealth*, 3 Gratt. 632, a like conclusion was reached in construing a constitutional provision that "all men shall be free to profess, and by argument maintain, their opinions in matters of religion; and the same shall in no wise affect, diminish, or enlarge their civil capacities."

We are of the opinion that the effect of this constitutional



provision is to abrogate the rule which obtained in this state prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or belief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice. It follows that there was no error in permitting the witness to testify.

The only remaining question which we deem it necessary to consider is the claim that the evidence is insufficient to warrant a conviction. It is insisted that there is no proof of the *corpus delicti*. The *corpus delicti* of the offense charged in the indictment is the making, procuring, etc., of dynamite, with intent to use the same for the unlawful destruction of the lives of the persons named in the indictment. At the time of the arrest of plaintiff in error, a large quantity of dynamite, and a number of bombs, of different make and material, were found in his possession. It was proved that he said, as indicating his intent, that he must kill Gary, Grinnell, and Bonfield, and that he would throw the bombs at them. In his statement made to the officers after his arrest, which was reduced to writing, and which he introduced in evidence at the trial, it appears that he went with Chleboun and Chapek to Aldine Square, for the purpose of finding Grinnell's residence, and that the intent of his companions, as expressed at the time, was to find Grinnell's house, and that they were talking of killing Bonfield. It appears, also, that he pointed out to said persons Grinnell's house, or what he thought to be his house. It is also shown that on different occasions he threatened to take the lives of the three persons named in the indictment, and said that he would throw the bombs at them in the court-rooms, or on the street, or wherever he might meet them. Indeed, it is not questioned that there is sufficient evidence of the intent of plaintiff in error to destroy the lives of said persons by means of such explosives, if it was believed by the jury to be true.

It is insisted, however, that there can be no presumption that Hronek had procured the dynamite with the unlawful intent indicated, from the fact that such dynamite was found in his possession. Where a party is found in possession of explosives, and has the avowed intention of using them for a particular purpose, the presumption would arise that he procured the same for such unlawful use. It is to be remarked that there was nothing in the business or vocation of Hronek that would call for or require the use or possession of explo-

sives. Moreover, it was shown by the witness Chleboun that he was at Hronek's house the last Sunday in May, 1888, when Hronek showed him some unfilled bombs, and Hronek then said that he would get dynamite with which to load them. He at that time spoke of an opportunity he had to kill Bonfield; that he did not do it, because he did not have the necessary weapon, but that he regretted it very much. The witness saw no dynamite that day. In June following, the witness again saw Hronek, at his request, and Hronek had a number of bombs which were charged. Some of them had fuses attached, and others had fulminating caps. Can it be questioned that if no explanation had been offered by Hronek as to when and how he came into the possession of the dynamite, the fact of its being in his possession in the month of June, with the avowed intent of using it in the particular unlawful way charged, coupled with his declaration, in May, that he would procure dynamite for the accomplishment of such unlawful purpose, would be sufficient to maintain a conviction for unlawfully procuring the explosive with the intent to use the same? In other words, would not the jury be justified in finding therefrom that the *corpus delicti* had been proved? The fact that he procured the explosive is shown by his having it in his possession. The unlawful intent is manifested by the character of the substance itself, his concealment of it, and his coteremporaneous declarations of his intent. A jury, from the necessity of the case, must be allowed to draw conclusions from the facts proved, and intent can ordinarily be shown only by inferences drawn from the acts of the party and from his declarations. Hronek is here shown to have been in the actual possession of the dynamite in June, 1888, and subsequently, by unquestioned evidence; and the fact of his intention is shown by his declarations and acts. If, from the facts proved, the conclusion is irresistible, if the testimony is believed, that the offense was committed, then the *corpus delicti* is established.

Some question is made in respect of the evidence of the date when the dynamite was procured by Hronek. He testified that one Karafiat left it at his house in the fall of 1886, and had never called for it. Without entering into a discussion of the evidence, it must be said that there was much in his own testimony, as there was also in the testimony of the witness Chleboun, that tended to discredit his evidence. The question was fully and fairly submitted to the jury as to

whether or not he procured the dynamite with the unlawful intent charged, after the first day of July, 1887, when the statute went into effect. They were told in numerous instructions that unless they believed from the evidence, beyond a reasonable doubt, that he procured the same with the specific intent charged on or subsequent to that date, they must acquit. Without extending this opinion, already too long, by an analysis of the evidence, it must suffice for us to say that we have carefully considered the record and the facts and circumstances proved, and are unable to say that the jury were palpably wrong in the conclusion reached by them. It is not enough that we, sitting as a jury, might have found differently. They saw the witnesses, had means of determining their credibility which we do not possess, and before we would be justified in setting aside their verdict for error in finding of fact, the error must be palpable.

Other minor objections are urged, which we have carefully considered, and there is no reversible error in them, and no good purpose would be served, either to the defendant or the profession, by their discussion.

We find no error in this record for which the judgment of the court below should be reversed, and it is accordingly affirmed.

Judgment affirmed.

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**STATUTES — TITLE OF AN ACT.** — As to what the title of an act must contain, see *Fidelity Ins. etc. Co. v. Shenandoah etc. R. R. Co.*, 83 Va. 1; 19 Am. St. Rep. 858, and note; *Fahey v. State*, 27 Tex. App. 146; 11 Am. St. Rep. 182, and note. The title is sufficient if it expresses the subject of the act in a general statement, with a succinct indication of the legislation respecting it: *Mortland v. State*, 52 N. J. L. 521; *People v. Nelson*, 133 Ill. 565; *State v. Brown*, 41 La. Ann. 771; *Ex parte Livingston*, 20 Nev. 282; *People v. Dobbins*, 73 Cal. 257; *State v. Miller*, 100 Mo. 439. The title must not contain more than one subject: *Railroad Co. v. Wyandotte*, 44 Kan. 32; *State v. Miller*, 100 Mo. 439. The title need not necessarily mention all the various objects of the act, provided that, as subsequently expressed in the body of the act, they are not at variance with the subject mentioned in the title, but in consonance therewith: *State v. Madison*, 43 Minn. 438. The provision of the constitution requiring the proper mention of the subject of an act in its title must be liberally construed: *Boyle v. Vanderhoof*, 45 Minn. 31. The title of an act is no part of the bill proper, and cannot alone repeal an existing statute: *Wolscheid v. Thome*, 76 Mich. 273. Nor is the "immediate effect" clause part of the bill itself: *Stow v. Grand Rapids*, 79 Mich. 595.

**ACCESSARIES BEFORE THE FACT**, under a statute providing that all who aid and abet in the commission of a crime shall be deemed as principals, may be indicted and convicted as principals: *People v. Bliven*, 112 N. Y. 79; 8 Am. St. Rep. 701, and note; *Griffith v. State*, 90 Ala. 583.

**TRIAL — INSTRUCTION — CREDIBILITY OF WITNESS.** — A judge should not express or intimate any opinion as to the credibility of a witness; *Sharp v. State*, 51 Ark. 147; 14 Am. St. Rep. 27, and note 36-48. The jury, and not the court, is judge of the credibility of witnesses and the sufficiency of the evidence: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Canajoharie Nat. Bank v. Defendants*, 123 N. Y. 191.

**WITNESSES — RELIGIOUS BELIEF.** — The right of a party to testify cannot be denied on the ground that he does not believe that God will punish perjury, if the constitution of the state declares that "no person shall be denied the enjoyment of any civil right merely on account of his religious principles": *Parcey v. Powers*, 51 N. J. L. 432; 14 Am. St. Rep. 693, and note.

## UNION MUTUAL ACCIDENT ASS'N v. FROHARD.

[194 ILLINOIS, 228.]

**INSURANCE — OCCUPATION OF AN ASSURED IS NOT CHANGED** from that of a merchant to that of a hunter by the fact that he, on a single occasion, engaged in the act of hunting as a recreation, and while so engaged, he accidentally shot and killed himself. Therefore, the insurer is not exonerated from paying the amount agreed to be paid on the death of a merchant, though the policy declares "that any member receiving an injury while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury."

**INSURANCE — OCCUPATION.** — THE WORD "OCCUPATION," when found in the by-laws or policies of insurance companies, must be held to have reference to the vocation, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are incidentally connected with the life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, and recreation.

**INSURANCE — POLICIES STIPULATING THAT IF THE ASSURED SHALL BE INJURED WHILE ENGAGED, TEMPORARILY OR OTHERWISE, IN ANY ACT OR OCCUPATION** classed as more hazardous than the one in which he is accepted according to the classification given by the rates and by-laws of this association, then the amount to be paid shall be according to the rate of the occupation in which the member is engaged when injured, does not limit the amount to be paid, when the assured is injured while hunting for recreation, if the by-laws classify hazards with respect to occupation, and do not designate any specific act as being more hazardous than others.

**INSURANCE — ASSESSMENTS AND AMOUNT TO BE PAID BENEFICIARY.** — IF THE BY-LAWS OF A MUTUAL ACCIDENT ASSOCIATION PROVIDE that the secretary shall make an assessment of two dollars upon all members belonging at the time of the happening of the injury, provided the amount in the treasury is not sufficient to pay the claim, and such amount, when collected, less ten per cent for expenses, shall be paid to the beneficiary, and shall be payment in full upon the part of the association, the beneficiary is entitled to be paid the full amount for which he is insured, if

there are sufficient funds in the treasury, otherwise the sum of two dollars may be assessed against each member, and if the sum received from such investment is sufficient to pay the amount of the insurance and the expenses of collection, such amount must be paid in full, but if the sum received from the assessment is insufficient to pay the insurance in full, then the expenses of collection, not to exceed ten per cent, may be deducted therefrom.

**INSURANCE.** — **LIABILITY FROM LOSS FROM DELAY IN LEVYING AN ASSESSMENT MUST BE BORNE BY THE INSURANCE ASSOCIATION**, where it has agreed to levy an assessment of two dollars upon all the members belonging to it at the time of the happening of an accident, for the benefit of the beneficiary, and it refuses, upon demand, so to do, and thereafter, and before any assessment is levied, the number of members liable to contribution is so materially decreased that an assessment levied against them will not realize enough to satisfy the just claim of the beneficiary.

*John M. Hamilton and Charles C. Gilbert*, for the appellant.

*Hamline and Scott*, for the appellee.

**BAKER, J.** On the first day of September, 1885, one John Frohard was accepted as a member of the Union Mutual Accident Association, and a certificate of insurance was issued to him. On January 26, 1887, while hunting with a gun, he accidentally shot and killed himself. The appellee, Minna Frohard, who is his widow, and the beneficiary named in the certificate, filed this bill in equity against the corporation, for the purpose of compelling it to levy an assessment of two dollars for each member of the association liable at the date of the accident, for the purpose of paying the amount of five thousand dollars specified in the certificate, or such part thereof as might be collected on the assessment, and praying also for general relief, and that in the event there was a deficiency in the amount collected on the assessment, the corporation and its officers be decreed to pay the difference between the amount so collected and five thousand dollars. Answer and replication having been filed, the cause was heard in the circuit court of Cook County, and that court found the allegations of the bill of complaint to be true, and entered a decree in conformity with the special prayers thereof. The decree was affirmed, on appeal, in the appellate court for the first district, and the record was brought to this court by a further appeal.

Section 2 of article 4 of the by-laws of appellant is as follows: "Any member who shall change his occupation to any other more hazardous than the one in which he was classified when insured shall immediately notify the secretary of such

change; and any member receiving an injury while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury; and such shall be payment in full upon the part of the company."

Article 14 of the by-laws classified certificates of insurance against accidents, and placed them in six divisions, designated, respectively, as A, B, C, D, E, and F. This classification purported to be, and was, solely upon the basis of occupations, the least hazardous occupations being placed in division A, the extra-hazardous occupations in division F, and other occupations in one or another of the intermediate divisions. It was provided in said article that in the event of the death by accident of a member in division A, a sum not exceeding five thousand dollars should be paid, and that in the event of such death of a member of division E, which was designated therein as "hazardous," a sum not exceeding one thousand dollars should be paid. Merchants were placed in division A, and hunters in division E. A claim is also made by appellant, that subsequent to the issuance of the certificate here in controversy, and prior to the death of John Frohard, a change was made in its by-laws, whereby the amount to be paid to a beneficiary in case of the death by accident of a member in division E was reduced from one thousand to five hundred dollars.

The certificate or policy of insurance which was issued to John Frohard provided, among other things, as follows: "That John Frohard, by occupation, profession, or employment a merchant, residing at Sparta, state of Illinois, is accepted as a member in division A of said association, subject to all the requirements and entitled to all the benefits thereof, as provided in the by-laws; and that said member, in case of death occurring through external, violent, and accidental injuries, is entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of five thousand dollars, which sum, or such a part thereof as may be collected for that purpose by the payment of one regular assessment of two dollars (\$2) for each member of the association liable at the date of the accident, shall, within sixty (60) days after sufficient proofs have been received, be paid to his wife, Minna, if surviving. . . . It is

expressly stipulated and agreed that in the event of the member being either fatally injured or otherwise disabled while engaged, temporarily or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association (or, if not specially mentioned, approximating thereto), then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full upon the part of the association. . . . It is expressly stipulated and agreed that this certificate is issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to."

The principal contention of appellant is, that the deceased was killed while engaged temporarily in an act or occupation classed as more hazardous than the one in which he was accepted, and that appellee is therefore entitled to recover only the amount provided for such hazardous risk and occupation. The contention of appellee is, that there was no change of occupation, within the meaning of the by-laws and certificate of insurance. The deceased was a hardware merchant. He did not follow the occupation of a hunter for hire or profit. He was killed while engaged in the act of hunting as a recreation, and it does not appear that he had hunted with a gun on any occasion since the issuance of the policy, other than that upon which the accident occurred.

In our examination of the provisions of the by-laws and contract of insurance, we will first ascertain the proper construction to be placed upon the former.

The language of section 2, as we have heretofore seen, is: "Any member receiving an injury while engaged, temporarily or otherwise, in an occupation more hazardous than the one in which he was engaged when issued," etc. Occupation is defined by lexicographers to mean, "that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade." The classification of hazards in article 14 of the by-laws is made upon the basis of occupations. Merchants, and those following other vocations, are placed in division A; grain-measurers and others, in division B; paper-hangers and others, in division C; teamsters and others, in division D; and boatmen and others, in division E. The by-laws in question must receive a reasonable construction. It would be unreasonable

and absurd to hold that the merchant who at one time measured a few bushels of grain, at another hung a few rolls of wall-paper upon his own premises, at another drove a team of horses in a carriage or wagon, and at still another rowed a skiff for exercise or recreation, became, within the true intent and meaning of these by-laws, at these several times, a grain-measurer, a paper-hanger, a teamster, and a boatman, respectively. The word "occupation," as found in these by-laws, must be held to have reference to the vocation, profession, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, or recreation. This view is not subversive of the word "temporarily," found in said section 2, for there would be full opportunity for giving force and effect to it in the event a professional man, merchant, or person in some other calling should temporarily abandon such vocation, and for purposes of profit, or as a means of gaining a subsistence, temporarily employ himself in some more hazardous occupation.

This construction of these by-laws seems to be sustained by the authorities. In *North American Life and Accident Ins. Co. v. Burroughs*, 69 Pa. St. 43, 8 Am. Rep. 212, there were conditions in respect to the matter of a change of occupation, and the deceased was insured as an earthenware manufacturer. He received a fatal injury from an accident which happened while he was assisting in hauling hay on a farm while he was on a visit to his grandfather, and it was held there was no change of occupation or business, within the meaning of the policy there involved. In *Stone's Adm'r v. United States Casualty Co.* 34 N. J. L. 375, the language of the condition was: "Policy-holders insured under the preferred class will not be entitled to recover for injuries received in any employment or by any exposure either more hazardous in itself, or classified by the company as more hazardous, than the occupations named in the preferred class." The deceased was insured as a teacher, but, while overlooking the construction of a building he was having erected, fell from a second story, and was killed; and it was held the language of the condition had respect to employments, and not to individual acts. See also *Miller v. Travelers Ins. Co.*, 39 Minn. 548.

It is urged, however, that the contract of insurance con-



tains the words "in any act or occupation," instead of the mere words "in another occupation," found in the by-laws, and that the words "while engaged, temporarily or otherwise, in an act" cannot be ignored, but that they have a definite and clear meaning, and must be given legal force and effect. It is to be noted that the words used in the contract are words selected and used by the corporation itself, and are therefore to be interpreted most strongly against it, or that, at all events, they are to be construed, according to their common and literal meaning, in favor of the insured.

The provision of the policy upon which is based the claim that the demand of appellee is reduced from one under division A to one under division E is not simply that if the deceased was fatally injured "while engaged, temporarily or otherwise, in any act or occupation more hazardous than the one in which he was accepted," but contains the further requirement, that the "act or occupation" that will be effective to work such reduction must be one that is "classed as more hazardous, . . . according to the classification given by the rates and by-laws of the association." These words last quoted are words of limitation, pertaining to and qualifying the terms "any act" and "occupation," as used in the contract. We have already seen that the classification of hazards made in the by-laws is predicated only upon occupations. There is not, in the by-laws or in the record, any classification of hazards in respect to acts; in other words, there is no act which is classified as more or less hazardous than another, and no act which is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased. The case, then, does not stand otherwise than it would if the word "act" were not found in the contract. The courts below properly held that the claim of appellee was under division A, and was for five thousand dollars.

The further point is made that the court erred in decreeing that appellant and its proper officers immediately levy one regular assessment of two dollars upon each member of the association liable to contribute at the date of the death of the deceased, to wit, January 26, 1887, and that upon collection of such assessment, appellant and its proper officers pay the amount realized thereon to appellee, and in case the amount realized from such assessment shall not be sufficient to pay the full sum of five thousand dollars, that the association and

its proper officers pay the difference between the said sum of five thousand dollars and the amount so realized from such assessment, to appellee. In the event of the death of a member from a bodily injury for which a liability is imposed upon the corporation, section 1 of article 11 of its by-laws provides: "The secretary shall make assessment of two dollars upon all the members belonging at the time of happening of said injury, provided the amount in the treasury is not sufficient to pay said claim; and such amount so collected, less ten per cent for expenses, shall be paid to the beneficiary when collected, and shall be payment in full upon the part of the association, not to exceed the amount of the grade in which injury was received.

The language of this by-law is awkward and ambiguous, and we must seek to give it a sensible and reasonable construction. As we understand it, the amount fixed for the grade or division in which the deceased member was at the time of the fatal injury is the amount due the beneficiary, and this is payable, primarily, out of moneys "in the treasury," and if the amount in the treasury is not sufficient to pay the full amount of the claim, then an assessment of two dollars upon each member liable is to be made and collected. If the amount so collected is sufficient to pay both the expenses of assessment and collection and the amount of the claim, then the beneficiary is to be paid that amount in full; but in the event the sum realized from the assessment is insufficient to pay both the claim and expenses, then ten per cent of the amount collected is to be retained by the corporation for expenses, and the residue, not to exceed the amount of the claim, is to be paid to the beneficiary, and is to be regarded as payment in full upon the part of the association.

Among the allegations in the bill of complaint of appellee were these, to wit: "The amount in the treasury of said association was not sufficient to pay the claim of your oratrix"; and "at the time of the death of said deceased, the membership of the said association liable to contribute to the payment due on account of the death of said deceased was more than sufficient to make up the full amount of five thousand dollars, by the payment of one regular assessment of two dollars from each member of the association liable at the date of the accident." These allegations were not denied in the answer of appellant, nor was any claim made therein that an assessment made in accordance with the provisions of the

certificate and by-laws would not have produced an amount of money sufficient to have paid in full both the claim of appellee and the expenses of the assessment and collection, nor was any showing whatever made therein, or by its evidence, in respect to the amount that could be collected from the members liable at the date of the death. Appellant merely tendered to appellee five hundred dollars as payment in full of her demand, and wrongfully insisted that was all she was entitled to receive under the certificate of insurance.

The undertaking in the certificate was to pay five thousand dollars, unless an assessment would not realize that amount; and at the hearing it was admitted by appellant that at the date of the death of the deceased there was not in the treasury of the association sufficient money to pay that amount to appellee, and also that at that date the number of members liable to contribute was more than sufficient to make up the full amount by the payment of one regular assessment on each member of the association liable to contribute, if the members liable would all pay said assessment. The number, names, and localities of the members of the association, and their willingness and ability to pay assessments, were matters peculiarly within the knowledge of the corporation, and in respect to which appellee was necessarily unadvised, and the corporation alone had charge of the assessments, and knowledge what the expense of making and collecting an assessment would be, and it, better than any one else, had knowledge what amount of money an assessment of two dollars on each of its members would produce. If there were facts known to appellant which indicated a probability that if an assessment had been made as provided for in the contract and by-laws all the members liable to contribute would not have paid said assessment, then it should have alleged such facts in its answer, and established them by its evidence. If the circumstances were such that an assessment would not have realized a sufficient amount to satisfy the claim of appellee in full, it was a matter of defense that should have been set up by appellant in its pleadings, and proven at the hearing. It not having done so, the averments in the bill which were not denied in the answer, and the admissions of appellant introduced in evidence at the hearing, raised a presumption as against it, it having wrongfully refused to make an assessment in conformity with its contract

and duty, that had such assessment been made, enough money would have been collected thereon to have paid in full the claim of appellee.

The views we have expressed on this branch of the case seem to be in substantial conformity with those held by other courts: *Elkhart etc. Ass'n v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514; *Kansas Protective Union v. Whitt*, 36 Kan. 760; 59 Am. Rep. 607; *Kansas Protective Union v. Gardner*, 41 Kan. 397; *Bentz v. Northwestern Aid Ass'n*, 40 Minn. 202; *O'Brien v. Home Benefit Society*, 46 Hun, 426; 4 N. Y. Supp. 275.

We may assume, then, that if the assessment had been made for the benefit of appellee at the time it should have been made by the officers of the association, in the early part of the year 1887, it would have produced five thousand dollars,—the full amount of her demand. It is at least probable that by reason of appellant's wrongful delay in making the assessment, the number of members who were at that time liable to contribute for the payment of her claim has materially decreased, and that the fund realized by an assessment made at a much later date will be insufficient to pay her in full. The loss, if any, occasioned by the delay would not be owing to any fault of appellee, but would be directly traceable to the wrongful conduct of appellant. It was but equitable and just, therefore, that the decree entered in the cause required that in the event of a deficiency in the amount realized from the assessment made in conformity with the decree, appellant should pay to appellee the difference between five thousand dollars and the amount realized.

We find no manifest error in the record, and the judgment of the appellate court is affirmed.

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ACCIDENT INSURANCE—CHANGE OF OCCUPATION OF THE INSURED.—A banker who was killed while attempting to get on a moving train did not meet his death "in any occupation or exposure classed by the company as more hazardous than that here given," within the meaning of such clause, as inserted in a policy of accident insurance: *Miller v. Travelers Ins. Co.*, 39 Minn. 548. For the meaning of the term, "changing his occupation," as used in policies of accident insurance, see note to *North American L. & A. Ins. Co. v. Burroughs*, 8 Am. Rep. 218.

MUTUAL BENEFIT SOCIETIES—ASSESSMENTS—RIGHTS OF A BENEFICIARY.—The designated beneficiary of a member of a mutual benefit association has, upon the death of such member, an interest, fixed and certain, in the bounty of his donor, and he may compel the association to levy an assessment for its payment: *Union Mut. Ass'n v. Montgomery*, 70 Mich. 587; 14

Am. St. Rep. 519. The association refusing or failing to levy such an assessment, the beneficiary may sue for damages for the breach of the contract: *Darrow v. Family Fund Society*, 116 N. Y. 537; 15 Am. St. Rep. 439, and note. Suing upon a policy issued by a mutual accident association doing business upon the assessment plan, which policy makes the insured a full-rate member, and provides that the sum mentioned shall be paid by an assessment made according to the provisions of the by-laws, and that the association will pay the amount realized from one assessment upon all the members at the time of the accident, not exceeding the sum of five thousand dollars, the complainant must allege that an assessment was made and collected, the amount thereof, and that payment was demanded and refused: *Deardorff v. Guaranty Mut. Acc. Ass'n*, 39 Cal. 593.

## WYLIE v. ELWOOD.

[104 ILLINOIS, 281.]

**NUISANCE — EVIDENCE.** — In an action to recover damages for an alleged nuisance, owners and occupants of property in the same neighborhood may be permitted to testify that they were annoyed and injured by the same nuisance. Such evidence is admissible, both to show the extent and character of the injury sustained by the plaintiff, and that the business objected to as a nuisance was capable of inflicting the injury complained of.

**NUISANCE — ONE WHO SUSTAINS, BY REASON OF A PUBLIC NUISANCE, A SPECIAL DAMAGE DIFFERENT** from that which is common to all may maintain an action for such damage, though there are many other persons injured to the same extent as himself.

**NUISANCE — A NUISANCE MAY BE BOTH PUBLIC AND PRIVATE AT THE SAME TIME.** Therefore, though the maintenance of a coal-shed and the operating of machinery therein may injuriously affect the occupants of many houses and stores, and constitute a public nuisance, yet an action may be maintained by a private person for damages resulting to him from coal-dust falling upon the furniture, food, and clothing in his house, and the noise of the machinery, deafening him in his dwelling and disturbing the rest and quiet of his home, though numerous other persons suffer similar injuries and annoyances from the same cause.

**NUISANCE — RIGHT TO MAINTAIN A NUISANCE BY A RAILWAY CORPORATION** so as to injure and annoy the occupants of adjoining land will not be implied from the grant to such railway of the land on which such nuisance is constructed and operated, when, under the constitution and laws in force when the grant was made, there could not be allowed in condemnation proceedings any damages for lands not taken. A simple grant of land to a railway will not be presumed to have been intended to have any greater effect than a condemnation judgment. Hence if the grantor retains lands adjacent to those granted, he or his successor in interest has the same right to recover for the use of the lands granted injurious to the lands retained, as if no grant had been made to the railway and its rights were based upon condemnation proceedings.

**NUISANCE CREATED BY A RAILWAY CORPORATION.** — A railway corporation cannot, many years after the construction of its road, erect a

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coal-shed, with machinery worked by steam-power, and located in the heart of a city, and so operated as to make a grinding, grating noise and scatter dust and dirt and destroy the comfort and injure the health of the occupants of adjoining property.

**NUISANCE** — A BUSINESS WHICH IS NOT A NUISANCE PER SE MAY BECOME SUCH BY REASON OF THE PARTICULAR LOCALITY in which it is situated, as where a coal-shed is located in the heart of a city, in the midst of stores and dwellings, and so operated as to make grating and grinding noises and to scatter dust and dirt, to the injury and discomfort of the occupants of adjoining property.

*Haley and O'Donnell*, for the appellants.

*Benjamin Olin and G. W. Brown*, for the appellee.

MAGRUDER, J. This is an action on the case, brought in the circuit court of Will County, by the appellee, Elwood, against the appellants, Wylie and Sutherland, and also against the Michigan Central Railroad Company and the Joliet and Northern Indiana Railroad Company, to recover damages sustained by the plaintiff below during the month from June 4 to July 5, 1888, in the use, occupation, and enjoyment of his dwelling-house, caused by the erection and operation by the appellants of a large coal-shed adjoining said dwelling-house in the city of Joliet, and the handling therein of large quantities of coal by means of machinery driven by steam-power, whereby intolerable noises were produced, and great quantities of coal-dust and dirt were cast upon and into said house, which dust and dirt continually settled down in large quantities upon the furniture, books, food, clothing, and other things in the house, to the great annoyance of the plaintiff, and so as to be destructive of the comfort and health of himself and his family, and cause material injury to his possession, use, and enjoyment of his home. Under the instructions of the court, the jury, upon the trial below, found the two railroad companies not guilty, and returned a verdict of guilty against the other defendants, the two appellants here. Judgment was entered upon the verdict. The appellate court has affirmed the judgment, and the case comes here by reason of a certificate of importance granted by that court.

The dwelling-house and the coal-shed are both located upon the south half of block 17, in Bowen's addition to Joliet. The south half of this block lies between Jefferson Street, on the north, and Washington Street, on the south, and between Michigan Street, on the west, and Eastern Avenue, on the east. On July 3, 1854, Joel A. Matteson and wife executed a

deed conveying to the Joliet and Northern Indiana Railroad Company the south part of the south half of the block lying between Michigan Street and Eastern Avenue, fronting south on Washington Street, and having a width or depth of 130 feet. It is claimed that this strip, 130 feet wide, was leased by the Joliet and Northern Indiana Railroad Company to the Michigan Central Railroad Company, though no such lease was produced in evidence. On May 2, 1887, the Michigan Central Railroad Company leased the strip to the appellant J. S. Wylie, of Davenport, Iowa, for three years, at a nominal rental of one dollar per year, for the storage and sale of coal, the lessor reserving the right to terminate the lease if the business should not be conducted to the satisfaction of the company, or the latter should desire the property for its own use. The coal-shed in question was erected upon this strip early in the summer of 1888, by Wylie, whose superintendent or manager is the appellant Sutherland.

On July 4, 1854, Joel A. Matteson and wife also executed a deed conveying to N. D. Elwood, the father of the appellee, the undivided half of that part of block 17 lying between the south line of Jefferson Street and the north line of the strip sold on the day before to the Joliet and Northern Indiana Railroad Company, said strip having a depth or width of about 145 feet, and extending from Michigan Street to Eastern Avenue. Appellee acquired his title as devisee under his father's will, and by deed from his father's executor. His house is located upon the strip so sold to his father, and fronts upon Jefferson Street. The south line of his lot adjoins the north line of the lot on which the coal-shed stands, and water from the eaves of the latter falls upon the lot. He built his house, and improved the grounds around it, and occupied it as a home, many years before the coal-shed was erected.

The coal-shed is about 610 feet long, 28 feet high, and from 54 to 56 feet wide, built of lumber, with a stone foundation, and a roof covered with tarred paper. It is open at the west end and on the south side, and has an open space on the north side between the siding and roof, so that the coal-dust escapes upon the adjoining premises. Cars are switched from the railroad tracks into the shed upon a raised platform. The coal is thrown into an iron hopper by means of an iron scraper operated by steam-power, and is then received into an iron conveyer run by steam, and lifted from 20 to 28 feet high, and

emptied into a chute or trough plated with iron, and conveyed through the same, and dumped upon the floor through openings in the chute. The shed will store 24,000 tons of coal. In June, 1888, from 15 to 23 car-loads of coal per day were delivered into it, each car-load holding from 12 to 20 tons; about 23 cars would be unloaded in one day. This process of lifting, conveying, and dumping the coal by means of machinery from the top of the shed to the floor below, in large masses, causes the coal to break and grind upon coming in contact with the iron conveyer, etc., and produces not only deafening noises, but clouds of coal-dust.

The evidence tends to show that the locality in question is in a thickly settled portion of the city, and that there are many houses and stores near plaintiff's residence on Jefferson Street, and also south of Washington Street, and east and west of the other streets above named. Many of the owners and occupants of these houses and stores were put upon the witness-stand, and swore that they also were annoyed and injured by the noises and coal-dust in question, in the use and enjoyment of their respective properties. In *Cooper v. Randall*, 59 Ill. 317, we held that such testimony was admissible to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the nuisance objected to was capable of inflicting the injury complained of.

It is urged, however, by the appellants that by the testimony thus admitted the nuisance was shown to have been a public one, and that a private action will not lie for injuries suffered from a public nuisance. Counsel for appellants thus state their position: "The annoyance complained of by the plaintiff is only such as he in common with the public is subjected to, and therefore he cannot have a private action to redress his supposed injury."

Undoubtedly the general rule is, that public or common nuisances, which are defined by Blackstone to be those "which affect the public and are an annoyance to all the king's subjects," can only be proceeded against by indictment, but it is also a well-established rule, that where a person sustains, by reason of a public nuisance, a special damage different from that which is common to all, he is not precluded from maintaining his action for such damage: Wood on Nuisances, secs. 618, 653.

The doctrine that special damage must be shown, in order to justify a private action for injury growing out of a public



nuisance, had its origin in the consideration of nuisances growing out of obstructions to highways and navigable streams. For instance, if a man dug a ditch across a public highway, the traveler would have no action for the inconvenience which he suffered from the interruption in common with the rest of the public; but if his horse fell into the ditch, and was killed, he would thereby suffer a special damage not common to others.

The strictness of the original rule has been greatly modified since the days of Lord Coke. Recovery may be had for damages which are consequential as well as direct: Wood on Nuisances, secs. 620, 621. An individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation: *Lansing v. Smith*, 4 Wend. 10; 21 Am. Dec. 89. The doctrine now is, that a nuisance may be at the same time both public and private. The use of a steam-engine in a crowded street may be a public nuisance, but in a case where the smoke from it also injured the goods in a man's shop, and made his dwelling uncomfortable, it was held to be such a private nuisance as would give him a right of action: Wood on Nuisances, sec. 649. In *Francis v. Schoellkopf*, 53 N. Y. 152, it was held that, although the stench from a tannery injured a large number of houses, yet the plaintiff, whose dwelling was made uncomfortable and almost uninhabitable, was entitled to sue for her particular injury.

In the case at bar, if the coal-dust falls upon the furniture, food, and clothing in appellee's house, he suffers a special damage to his own property, even though it be true that coal-dust from the same coal-shed falls upon the man who passes on the street in front of his door, or upon similar articles of property in his neighbor's house. If the noise of the grinding machinery deafen him in his own dwelling, the rest and quiet which he is entitled to enjoy in his home are disturbed, and he is none the less injured because the home of his neighbor is rendered unendurable from the same cause. Injury to a vested right is a sufficient special damage to maintain an action against the promoter of a public offense: Wood on Nuisances, sec. 656. As was said in *Francis v. Schoellkopf*, 53 N. Y. 152: "It is no defense for a wrong-doer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons."

We therefore think that the court below committed no error in overruling the motion of the defendants to exclude the plaintiff's evidence, inasmuch as the plaintiff was entitled to maintain his action, even though the nuisance in question could be regarded as a public one.

The next error assigned by the appellants is the refusal of the trial court to give certain instructions, which stated to the jury, in substance, that the Michigan Central Railroad Company would have had the right to erect and operate the machinery in the coal-shed upon the alleged ground that such operation was a lawful railroad use of the right of way, and that the company had a right to license Wylie to do what it could itself thus do; that the original owner of the south half of block 17, by his deed to the lessor of the Michigan Central Railroad Company, received a consideration, thereby, for all future injury to the portion of the block retained by him growing out of such lawful railroad use of the part so deeded and sold; that therefore appellee, holding title under such original owner, is without redress for the damages occasioned by such use. We are of the opinion that there was no error in the refusal of the instructions in question, for the reasons hereinafter stated.

The charter of the Joliet and Northern Indiana Railroad Company has not been introduced in evidence, and therefore it does not appear whether or not that company had any authority to lease the property to the Michigan Central Railroad Company; and if it did so lease it, it does not appear, in the absence of such lease and of the charter of the Michigan Central Railroad Company from the record, whether or not the latter company was authorized to make the lease to Wylie. Nor does it appear, from either of the deeds above referred to, or otherwise, that the land on which the shed stands was conveyed to the Joliet and Northern Indiana Railroad Company, or held by it as right of way. But we will treat the case, as the counsel on both sides seem to do, as though the Michigan Central Railroad Company was the lessee of the Joliet and Northern Indiana Railroad Company, and as though the coal-shed stood upon the railroad right of way, and as though the appellants were authorized to use the shed and the machinery in it for the same purposes for which their lessor could have used it.

1. The deed from Matteson to the Joliet and Northern Indiana Railroad Company did not recite that the strip therein

described was conveyed for the purpose of constructing a railroad, or for any purpose connected with the construction or use of a railroad, or for any purpose connected with the preservation, occupation, and enjoyment of a railroad. It was a simple conveyance of land in fee-simple, without any reference to the use to which it was to be applied. When it was made, no part of the Joliet and Northern Indiana railroad had been built. Moreover, the deed was executed in 1854, while the constitution of 1848 was in force. Under that constitution, compensation, in condemnation proceedings, was only awarded for the land taken, and not for damages to the land not taken. It cannot be claimed that a simple deed or grant of land for right of way to a railroad company will be presumed to have any greater effect than a condemnation judgment. It is said that as condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from a proper construction of the improvement. But it is difficult to understand how, under the constitution of 1848, where the owner only received, as the result of the condemnation proceeding, compensation for the land taken, and not damages to the land not taken, a deed of land to a railroad company, made when that constitution was in force, can be presumed to have been in consideration both of compensation for the land conveyed and of future damages to the land not conveyed, in the absence of anything on the face of the deed to show that the land was conveyed for any particular purpose, or that the parties had in mind any damages to accrue to other land: *Chicago etc. R'y Co. v. Smith*, 111 Ill. 363; *Chicago etc. R. R. Co. v. Loeb*, 118 Ill. 203; 59 Am. Rep. 341.

The position of appellants is, that the consideration of the deed from Matteson to the Joliet and Northern Indiana Railroad Company included not only the value of the strip 130 feet wide thereby conveyed, but also all damages thereafter to result from the construction and operation of the railroad to the strip 145 feet wide, deeded the next day to N. D. Elwood. In *Chicago etc. R'y Co. v. Smith*, 111 Ill. 363, we said: "A mere conveyance of a tract of land might not give to the grantee the right to make any use of it which would injuriously affect any other land; for the law would attach the same condition as in general exists with respect to the holding of all land, — that the owner shall so use it as not to produce injury to another; but in the case before us there is the

grant for this very use itself, which will injuriously affect other land, and for no other use."

The doctrine announced in some of the text-books that where land has been acquired for railroad purposes by deed or grant, as well as by condemnation, all damages to the portion of the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price, may well be applied to such a deed or grant made in this state since the constitution of 1870 went into force. That instrument provides that "private property shall not be taken, or damaged, for public use without just compensation." But the doctrine can certainly have no reference to a simple deed made before the adoption of the constitution of 1870, and containing no statement of any use which was to be made of the land conveyed. It is to be noted that the point here discussed is, not whether there was any remedy for injury to the land not taken before the adoption of the constitution of 1870, but whether damages for such injury could be regarded as paid for by the price named in such a deed, conveying the land taken, as the deed above described. We think that such could not be the effect of the deed.

2. In any case, where the doctrine contended for can be applied, it only contemplates that the grantor or those holding under him shall be prevented from recovering damages for such injuries as arise from the proper construction of the road, and such as necessarily result from or attend upon its ordinary and prudent operation. Railroads are a public necessity and a public benefit. Many inconveniences and annoyances grow out of their operation which must be borne by the public. The passage of a train of cars upon the street of a city or town is necessarily attended with noise, with the emission of smoke, with detention at the crossings, etc. No recovery can be had for injuries suffered from such causes.

But a railroad company has the power to do certain things, which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers. It may use its right of way for such purposes. Its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon may not produce any such injury. The selection of a locality where damages are inflicted,

in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road.

In the present case, the company, or those authorized by it, thirty-three or thirty-four years after the original construction of the road, erected this coal-shed, and placed in it a new contrivance, worked by steam-power, for unloading coal, in the heart of a city, in a locality thickly settled and surrounded by residences and stores, creating thereby grinding, grating noises, and scattering dust and dirt that destroy the comfort and injure the health of those living upon the adjoining property. Here was a new use of the right of way, not contemplated at the time of the original grant, not resorted to for many years thereafter. The construction of the shed in 1888 could not have been anticipated by appellee, who built his house in 1876, and began to occupy it in 1881.

This structure, though not a nuisance *per se*, became such by reason of the particular locality in which it was situated. It is as much the duty of a railroad company as of an individual to so use its property as not to injure others. The question whether or not the coal-shed and its machinery were located in a proper place was fairly left to the jury by the instructions of the court.

In *Illinois etc. R. R. Co. v. Grabill*, 50 Ill. 241, where a cattle-pen, kept by the railroad company near the premises of the plaintiff, was the source of noxious smells, rendering such premises unwholesome and uninhabitable, it was held that such indispensable structures, even though the right existed to erect them in the heart of a city, ought to be located at such a distance from populous neighborhoods as to avoid the injurious results produced by them.

In *Cooper v. Randall*, 59 Ill. 317, which was an action for damages to plaintiff's premises arising from a flouring-mill on a lot near such premises, which threw upon them chaff, dust, dirt, and other impurities, the following instruction was approved: "A flouring-mill is not necessarily a nuisance, nor unlawful in its use, management, or purpose. A man has a right to erect a mill in a proper place, — to run, use it, etc., in a proper manner; . . . and if said mill is in a proper place, used and operated in a proper manner, and without material injury to the possession or reversionary right or interest of plaintiff, jury should find for defendants." "Material injury" was there defined to be a real, and not imaginary

or fanciful, interference with the reasonable enjoyment of the property.

In *Whitney v. Bartholomew*, 21 Conn. 213, the action was for damages to plaintiff's property by reason of a carriage factory and blacksmith-shop occupied by defendant on his own land adjoining the lot on which stood the plaintiff's dwelling-house. It was shown that cinders, ashes, and smoke from the chimneys of the shop were thrown upon plaintiff's house, land, clothes, etc., and that the ashes, etc., fell into her well, etc. Judgment for plaintiff was affirmed, and it was there held that the factory and shop were not nuisances *per se*, but that "the shop was erected and the business pursued in an improper place"; that some things, not unlawful, become so "in respect to the time, place, or manner of their performance"; that defendant was bound to use the shop, even though on his own land, so as not to injure his neighbor; "that, of trades which are lawful, some may be nuisances in cities, which are harmless in the country."

*Shively v. Cedar Rapids etc. R'y Co.*, 74 Iowa, 169, 7 Am. St. Rep. 471, was an action against a railroad company to recover damages, wherein it appeared that the company built and maintained stock-yards within sixty feet of plaintiff's lot for the use of shippers over the road, and that there were emitted therefrom foul odors, which rendered plaintiff's house almost uninhabitable, and endangered his health, etc. It was claimed that the yards were necessary to the operation of the road, and that the odors could not be prevented even where the yards were properly conducted. Judgment for plaintiff was sustained, and the court said: "It is not shown that they [the odors] are unavoidable, nor does it appear that the yards might not have been located at another place where they would have met the necessities of the road and its patrons."

It was also left to the jury, by the instructions in this case, to say whether this particular mode of handling coal and unloading it from cars was a proper mode or not. If unloading coal in this shed with such machinery upon the company's right of way was a part of the necessary operation of the road, plaintiff could not be precluded from a recovery for injuries thereby suffered, unless such process of unloading was prudent, careful, and proper.

We perceive no error in the record which would justify a reversal. The judgment of the appellate court is accordingly affirmed.

**NUISANCE — PUBLIC NUISANCE ABATED AT INSTANCE OF PRIVATE PARTY.** — A private citizen can only abate a public nuisance when it becomes an obstruction to the exercise of his private right: *Brown v. De Groff*, 50 N. J. L. 409; 7 Am. St. Rep. 794, and note. In case of a public nuisance, equity will interfere at the instance of a private individual only when the complainant suffers some private, direct, and material damage: *Van Wagenen v. Cooney*, 45 N. J. Eq. 24; *Wesson v. Washburn etc. Co.*, 13 Allen, 95; 90 Am. Dec. 181, and note.

**NUISANCE.** — No one can so use his property as to create a nuisance, or have property which is a nuisance where located: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; *Cahill v. Eustman*, 18 Minn. 324; 10 Am. Rep. 184; *Nevins v. City of Peoria*, 41 Ill. 502; 89 Am. Dec. 392.

**NUISANCE.** — A lawful business may be so carried on as to become a nuisance: *Norcross v. Thomas*, 51 Me. 503; 81 Am. Dec. 588; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Burditt v. Swenson*, 17 Tex. 489; 87 Am. Dec. 665.

**NUISANCE.** — Where the acts of a railroad company amount to a legal nuisance to the occupants of dwelling-houses adjacent to the track complained of, it cannot justify such acts on the ground of necessity and adverse user: *Pennsylvania R. R. Co. v. Thompson*, 45 N. J. Eq. 870.

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## WACASER v. PEOPLE.

[124 ILLINOIS, 433.]

**JURY TRIAL — REFUSAL OF INSTRUCTION.** — Where a trial court throws aside all instructions asked by one or both of the parties, and gives instructions of its own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury was suffered by the losing litigant by the refusal of the instructions asked by him.

**CRIMINAL PROSECUTION. — INSTRUCTIONS TO A JURY THAT THEY MUST BE SATISFIED FROM THE EVIDENCE** that the killing was done under an honest belief on the part of the defendant that it was necessary to save himself from death or great bodily harm is erroneous, if the accused is on trial for murder and claims that the killing was in self-defense. It is sufficient that the jury believe, from evidence, the essential facts of his defense, and they may so believe though such facts are not shown to their satisfaction.

**CRIMINAL PROSECUTION — REASONABLE DOUBT.** — The court should not refuse an instruction that "a reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause."

*John R. Eden, F. M. Wright, and M. W. Matthews*, for the plaintiff in error.

*George Hunt, attorney-general, John E. Jennings, state's attorney, and Horace S. Clark*, for the people.

MAGRUDER, J. At the November term, 1888, of the circuit court of Moultrie County, the plaintiff in error, Frank W. Wacaser, and one Owen M. Babb, were indicted for the murder of John B. Cline, in said county, on May 17, 1888. A trial was had at the April term, 1889, of said court, which resulted in a verdict of not guilty as to Babb, and a disagreement of the jury as to the plaintiff in error. Afterwards, in June, 1889, the cause was removed by change of venue to the circuit court of Champaign County, where a second trial was had, in November, 1889, and by the verdict of the jury the defendant was found guilty of manslaughter, and his punishment fixed at twenty-five years in the penitentiary. Judgment was rendered upon the verdict, after the overruling of motions for new trial and in arrest of judgment.

In the neighborhood where the farms of these parties were located, the public road runs north and south; Wacaser lived on the east side of the road; north of him, and on the west side of the road, lived Bryan, a brother-in-law of Cline, while still farther to the north lived Cline, the deceased. North of his house, and in the northeast corner of his farm, Bryan had a pasture containing ten acres, inclosed by a board fence on the north, and by a board and wire fence on the west. Wacaser had rented, and planted in corn, some land belonging to his father, and lying north of Bryan, and he also owned some land to the west of Bryan. The land of Bryan lying west of his pasture had been recently plowed.

Westward from the public road, and along the fence on the north side of Bryan's pasture, runs a "turning row," which is wholly upon the land belonging to Wacaser, or rented by him from his father. Prior to the homicide, there had been some dispute between Bryan or Cline and Wacaser as to the boundary line between the Wacaser land and the Bryan land; plaintiff in error had expressed his unwillingness that Cline should go upon his land; he seems to have claimed that Bryan's north fence was upon his land, and there is something in the evidence to the effect that he had once had Bryan indicted.

Early on the morning of May 17, 1888, plaintiff in error sent three men to work in his field lying west of Bryan's pasture. Shortly afterwards he himself started in a wagon with his hired man, named Babb, and a boy about fifteen years old, named Cunningham, to go to the same field for the



purpose of planting potatoes. He traveled northward on the public road until he reached the northeast corner of Bryan's pasture, then turned from the public road into the turning row, and drove westward along the turning row until he had reached a point about seventy-five or one hundred yards west of the northwest corner of Bryan's inclosure. Here he looked back and saw the deceased driving a team, behind which he was walking, from the public road into the turning row. He hallooed to Cline, and motioned to him to go southward on the public road, but Cline turned into the turning row and drove westward. Plaintiff in error then gave the reins to Cunningham, jumped out of the wagon, remarking, "There comes a man I don't want to cross my land," and went eastward towards the deceased. The latter in the mean time turned his team southward upon Bryan's land and along the west fence of Bryan's pasture, and, throwing the lines over the second or third post of the fence, returned to meet Wacaser. A fracas then occurred between the two men, near the northwest corner of the pasture, in the turning row, or a few feet south of it, and near the west fence of the inclosure.

During the fracas, the plaintiff in error stabbed Cline with a knife or dirk. The deceased went through the fence into the pasture, and, while going southeast towards Bryan's house, fell upon the ground, and died before reaching the house.

We forbear entering into a detailed discussion of the evidence, as the case must be reversed and sent back for another trial for the reasons hereinafter stated. It was sought, upon the trial below, to justify the homicide upon the ground of self-defense. It is claimed upon the part of the defendant that the fatal blow was given under circumstances sufficient to create in his mind a well-grounded belief that he was in danger of losing his life or suffering great bodily harm. It was for the jury to say whether or not the theory of self-defense was established, but it was important, under the circumstances of the case as disclosed by the record, that they should be accurately instructed.

The defendant asked the trial court to give twenty instructions, all of which were refused. The trial judge then, of his own motion, gave and read to the jury an instruction written and prepared by himself. No instructions seem to have been asked by the prosecution, but whether such was the fact or not, no other instruction than that prepared by the court was

given. The instruction so given is very long, consisting of thirty-six paragraphs.

In *Hill v. Parsons*, 110 Ill. 107, all the instructions requested by both sides, seven on behalf of the plaintiffs and eight on behalf of the defendants, were refused, and three instructions, carefully prepared by the court, were read to the jury. In that case it was said: "Whether any of defendants' instructions contained correct propositions of law or not is not a material inquiry here, as the instructions given by the court fairly instructed the jury on all legal questions involved in the case. No injury was done by the refusal of the instructions prepared by them." It may be laid down as a sound rule that where the trial court throws aside all the instructions asked by one or both of the parties, and prepares written instructions of its own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done to the defeated party by the refusal of the instructions asked by him. As to more than a dozen of the instructions which the defendant in this case requested the court to give, it is not claimed that they were erroneous, but it is insisted that their substance was embodied in the instruction prepared by the court. This is, for the most part, true. But we think that the twenty-sixth paragraph of the given instruction was calculated to mislead the jury. Its first clause is as follows: "If a man kills another, and the killing be proven or admitted, and then sets up self-defense as a defense to the indictment, the jury ought always [to] be satisfied from the evidence that the killing was done under an honest belief on the part of the defendant that it was necessary to save himself from death, or great bodily harm," etc.

Instructions which require the proof to be such as to produce "satisfaction" in the minds of the jury have been several times condemned by this court. In *Herrick v. Gary*, 83 Ill. 85, which was a civil case, the instruction was: "The plaintiff must show, by the evidence in the case, to the satisfaction of the jury," etc. We there said of this language: "It places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe from the evidence that the essential facts are true. The jury may so believe, although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not merely that the evidence shall produce belief, in the mind of the jury,

of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is perhaps not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. The mind cannot well be said to be satisfied as to a given proposition so long as such matter remains at all in doubt. For this reason the instruction must be condemned."

Later, in *Graves v. Colwell*, 90 Ill. 612, also a civil suit, an instruction, which required a fact to be proved "to the satisfaction of the jury," was interpreted as requiring the preponderance of proof to be so greatly in favor of such fact as to satisfy their minds,—“a thing which could only be accomplished by producing a state of moral certainty, or in other words, by proving beyond a reasonable doubt” such fact.

Later still, in *Alexander v. People*, 96 Ill. 96, the principle announced by the civil cases was applied to a criminal case. In the *Alexander* case, the accused sought to show that he was justified or excused in committing the homicide, and the condemned instruction told the jury that it was “incumbent upon the defendant satisfactorily to establish such defense.” We there said: “This is stating the rule of evidence broader than the law will warrant. The statute provides that he is only bound to prove the circumstances that justify or excuse the homicide as any other fact is to be proved, and as this instruction cast upon the accused what may have well been understood to be a higher degree of proof, it is plainly erroneous, and may have prejudiced the defense.”

In view of the interpretation thus given by this court to the language used in the above-quoted clause of the given instruction, the clause in question must be regarded as erroneous.

Again, the ninth instruction asked by the defendant should have been given. It is as follows: “A reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause.” This definition of “reasonable doubt” may not be quite so full and accurate as the definition already approved of by this court in a number of cases (*Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320), but it is substantially the same as that laid down in *Dunn v. People*, 109 Ill. 635. The defendant was entitled to have the jury instructed as to what a reasonable doubt was, if he submitted an instruction correctly

defining that term. We find no definition of reasonable doubt in the instruction given by the court, which embodies the full meaning conveyed by the refused instruction.

For the reasons here indicated, the judgment of the circuit court is reversed, and the cause is remanded to that court.

**HOMICIDE — INSTRUCTIONS.** — In homicide cases the following instruction may be properly refused by the court: "If the jury believed from the evidence there was a reasonable belief in his [the prisoner's] mind of some great personal injury or bodily harm about to be committed on him by the deceased, and that there was reasonable ground on his part to believe that he was in danger of great bodily harm from the deceased, whether it actually existed or not, the killing, under the circumstances, would be exonsable"; *Despres v. State*, 33 Ala. 380; 73 Am. Dec. 422. The court cannot properly instruct the jury that the accused must satisfy the jury beyond a reasonable doubt that the homicide was justifiable: *People v. Schryver*, 42 N. Y. 1; 1 Am. Rep. 480; *Stokes v. People*, 53 N. Y. 164; 13 Am. Rep. 492.

**CRIMINAL LAW — REASONABLE DOUBT.** — As to what is the meaning of "reasonable doubt," as used in instructions in criminal cases, see *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147, and note; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *Commonwealth v. Webster*, 5 Cush. 275; 52 Am. Dec. 711; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; *Little v. State*, 89 Ala. 99; *Jones v. State*, 90 Ala. 628; *Cavender v. State*, 128 Ind. 47; *People v. Bemmerly*, 87 Cal. 117; *Commonwealth v. Miller*, 139 Pa. St. 77; ante, p. 170, and note.

**CRIMINAL LAW — INSTRUCTION — REASONABLE DOUBT.** — One on trial for crime may demand a concise instruction upon the question of reasonable doubt: *State v. McKinzie*, 102 Mo. 620. An accused is not required to prove his innocence beyond a reasonable doubt: *Lewis v. State*, 29 Tex. App. 105. Where the evidence shows an attack upon defendant by the deceased, whereby he might have apprehended danger to his life, it is error to refuse to charge the jury that if the evidence raised a reasonable doubt of murder in the second degree, they must acquit: *Tiffany v. Commonwealth*, 121 Pa. St. 165; 6 Am. St. Rep. 775.

## CONSOLIDATED ICE-MACHINE COMPANY v. KEIFER.

[124 ILLINOIS, 481.]

**MASTERS AND SERVANTS.** — If two or more persons are engaged in the performance of their several parts of a work, it is the duty of each to use reasonable care to avoid injury to the servants of the other.

**THE NEGLIGENCE OF TWO OR MORE PERSONS CREATES A JOINT AND SEVERAL LIABILITY AGAINST THEM** for injuries resulting therefrom when they are acting together to accomplish a common purpose, though the work was apportioned among them.

**NEGLECTENCE, WHEN JOINT.** — If A is to fix the location of a refrigerator plant and to provide a truss or support for a tank, and B, when this is done, is to erect a stand and put the tank upon the support so furnished, and A is negligent in not providing sufficient support, and B,

knowing the insufficiency of such support, directs one of his employees to work upon the tank, and it falls by reason of the insufficiency of the support and injures such employee, A and B are jointly and severally answerable to him for the damage suffered by such injury.

**NEGLIGENCE. — THAT THE NEGLIGENCE OF A THIRD PARTY CONCURRED** with that of the defendant in producing the injury is no defense.

**EVIDENCE — IMPRACHING WITNESS. —** Where a witness testifies to a particular state of facts, he may be asked, on cross-examination, whether he did not at a prior designated occasion testify to a certain state of facts, and if he answers that he does not recollect, his testimony given on such prior occasion may be introduced in evidence to show that he did so testify.

**EVIDENCE. — THE STATEMENT OF A SUPERINTENDENT OF A CORPORATION TO AN OFFICER OF ANOTHER CORPORATION,** that supports provided by the latter to support a tank are insufficient, is admissible in evidence against both corporations to show that each had notice of such insufficiency.

**EVIDENCE COMPETENT AS AGAINST EITHER OF SEVERAL DEFENDANTS** may be admitted against the defendant in respect to whom it is competent, and its use and application limited by proper instructions.

**WITNESSES. — A STOCKHOLDER IS NOT COMPETENT,** under the common law, to testify in favor of the corporation.

**MASTER IS ANSWERABLE FOR THE NEGLIGENCE OF HIS SERVANTS BY WHICH ANOTHER IS INJURED,** though such negligence consists in failing to do an act in the manner in which the master directed the servant to do it.

*Leo Kassieur, W. C. Kueffner, and M. Millard* for the appellants.

*G. B. Burnett, R. A. Halbert, and Flannigan and Rafter,* for the appellee.

**SHOPE, J.** The judgment of affirmance rendered by the appellate court is conclusive upon all questions of fact. It must be presumed that the facts were found to be sufficient to maintain the plaintiff's cause of action against each of the defendants, and that the negligent conduct of each contributed to the death of the intestate.

The principal question arises upon objection to the first instruction given at the instance of plaintiff. That instruction told the jury, in effect, that if the evidence warranted, they might find either or both of the defendants guilty, and was, as said by counsel, "based upon the supposition that there was a joint liability." It is insisted with great earnestness that these defendants could not be jointly liable, because, as it is said, they did not co-operate and unite in the commission of a tort, and, in respect of their negligence, that the brewing company owed the deceased no duty, and that where negligence is relied upon as the ground of recovery, the duty must

be joint, in order to make the liability joint. If this was so, it would necessarily be presumed from the judgment of affirmance that the facts sustained the right of recovery. Upon looking into the evidence, however, it will be found that it sustains the allegations of the declaration.

It is shown that the ice-machine company undertook to erect a refrigerator plant for the brewing company, at its brewery, which included a large iron tank. The brewing company was to fix the location for the plant, and make and put in proper supports for the tank. It selected its engine-room for this purpose, and the iron tank was to be set upon supports eighteen or twenty feet from the ground. To do this, part of the roof of the engine-house was cut away, and one side of the tank was to rest upon one wall of the engine-room, and the other was supported by a truss made of two wooden beams, fourteen inches wide and seven inches thick, twenty-four feet long, bolted together; and these beams were further strengthened by a hog-chain. The hog-chain consisted of two iron rods, anchored, one in the north and the other in the south wall of the engine-room, and joined together in the center of the supporting-beams by a swivel. Timbers were laid from this truss to and upon the east wall of the engine-house, and upon this structure the iron tank was placed, extending three feet over the beam, so that the greater portion of the weight of the tank rested upon the truss. It is shown that when the truss was completed, the superintendent of the ice-machine company told the president of the brewing company that it was insufficient, and never would support the tank, who replied, in substance, that it would do. Without further objection, the ice-machine company placed the tank on the support as intended by the brewing company. After the tank was up, the superintendent of the ice-machine company directed the intestate, with others, to go upon the roof of the engine-house and fit in it the heater. The tank was, at the time, being filled with water; and while the intestate was on the roof, in compliance with such direction, the truss gave way, the tank fell, taking with it part of the roof of the engine-house, and precipitating Keifer to the floor of the engine-room, whereby he was killed.

Under the state of facts alleged and shown, it was the duty of each of the defendants, in the performance of their several parts of the work, to use reasonable care to avoid injury to the servants of either, and to third persons. If Dennerty, the

superintendent of the ice-machine company, knew, as he told Heim, that the truss provided by the brewing company would not support the tank, he was guilty of negligence in sending the intestate to work upon the tank while it was being filled with water. On the other hand, it was the plain duty of the brewing company, when it undertook to provide the support, to make it sufficient to sustain the tank when filled with water. The purpose of the erection of the tank was, that it might be filled with water, and the disastrous consequences of an insufficient support could be readily foreseen. That the tank fell because of the insufficient support furnished by the brewing company is determined by the judgment of the appellate court. But if this were not so, there is evidence tending to show it was wholly insufficient, and that knowledge thereof was brought home to the brewing company before the tank was placed thereon.

It is, however, claimed that if either defendant has been guilty of negligence resulting in injury to the intestate, it is their several negligence, and cannot be charged against the other defendant. The evidence shows, beyond dispute, that both defendants, in respect to the matters being considered, were acting together to accomplish a common purpose. It is true, the work was apportioned among them; but this does not change the common purpose and object of their several acts. The brewing company, as we have seen, was to fix the location of the plant, and provide the truss or support for the tank. When this was done, the ice-machine company was to erect a plant, and put the tank upon the support so furnished. The parts acted by each company looked alone to the erection and completion of the refrigerator plant. As said by the appellate court: "The brewing company was negligent in providing a structure which was unsafe and insufficient, whereby deceased incurred an extra peril, when at his work, not incident to his employment. The ice-machine company was negligent in directing deceased to work in this place of danger, it having knowledge, and he being without notice or knowledge, of such danger, and the successive concurrent negligence of appellants thus united in causing the death of Keifer."

In Cooley on Torts, 1st ed., 684, it is said: "In general, the negligence of third parties concurring with that of the defendant to produce an injury is no defense. It could, at most, only render the third party liable to be sued also, as a joint wrong-doer": *North Pennsylvania R. R. Co. v. Mahoney*, 57

Pa. St. 187; *Cleveland etc. R. R. Co. v. Terry*, 8 Ohio St. 570. In Hilliard on Remedies for Torts, 178, the law is thus stated: "One injured by the concurrent negligence of two persons may maintain a joint action against them. Thus where the trains of two companies using the same track come in collision, an action is maintainable against them jointly for the injuries incurred": *Colegrove v. New York and New Haven R. R. Co.*, 20 N. Y. 492; 75 Am. Dec. 418. Deering, in his work on negligence (sec. 395), says: "An action lies against two persons jointly superintending a work which was so negligently done that it caused injury to the plaintiff; and it makes no difference that one rendered his services to the other gratuitously": *Hawkesworth v. Thompson*, 98 Mass. 77; 93 Am. Dec. 187. And again: "When separate and independent acts of negligence of two persons are the direct cause of a single injury to a third person, it is impossible to determine in what proportion each contributes to the injury. Either is responsible for the whole injury, and this, though his act alone might not have caused an injury, and though, without fault on his part, the same damages would have resulted from the act of the other": See *Slater v. Mersereau*, 64 N. Y. 138. In Wharton on Negligence, sec. 788, the rule is stated to be, that "if two or more persons are jointly concerned in a particular act, they may be sued jointly." And so if several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform, or for performing it negligently. All persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independent of each other: 1 Shearman and Redfield on Negligence, sec. 122. In *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178, it was held that an act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable; and it was held that if a passenger on one vessel is injured by its collision with another, in consequence of the negligence of the officers of both, he has a right of action against them jointly. See also *Stone v. Dickinson*, 5 Allen, 81; 81 Am. Dec. 727; *Cooper v. Eastern T. Co.*, 75 N. Y. 116; 2 Thompson on Negligence, 1088. In *Wabash, St. Louis, and Pacific R'y Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, which was a case where a passenger upon one train of cars was killed by the collision with the train of another



company using the same track, through the mutual negligence of the servants of the two companies, we said: "We are of opinion the public interests will be best subserved by adhering strictly to the long and well established principle, that one who has received an actionable injury at the hands of two or more wrong-doers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has his election to sue all jointly, or he may bring his separate action against each or any one of the wrong-doers."

There can, in such case, be no apportionment of damages as between the several parties whose negligent acts and conduct have contributed to the injury. Nor can one of the wrong-doers compel contribution from the other. There can be but one recovery for the damages sustained, and this, as we have seen, may be several as against each wrong-doer whose act or negligent conduct has contributed to produce the injurious result; and where the negligence of two or more persons directly concurs to produce the injury, although one may have undertaken one part, and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be jointly liable. The test seems to be, whether or not the negligence of each directly contributed in producing the injurious result. Here the brewing company intended that its defective support should be used as it was used, and it having express notice of the insufficiency thereof, it became responsible to any one injured, while exercising due care, from the use to which it was thus applied by its direction and supervision; and the ice-machine company, with knowledge of its insufficiency, went on and placed the tank thereon, and thereby became responsible for injuries to any of its servants it might send to work upon the tank without giving them notice of the danger to which they were exposed. Here the negligence of each of these defendants directly concurred in producing the death of Keifer.

It is urged that the court erred in the admission of evidence. The witnesses Marion and Gaines testified at the trial that if the swivel in the hog-chain had not been defective the truss would have supported from sixty thousand to one hundred thousand pounds. On cross-examination, plaintiff showed by them that they testified at the coroner's inquest upon the body of Keifer, and having identified the transcript of their

testimony, as taken down by the coroner, and signed by them, they were asked if they did not state in that examination that the hog-chain, if perfect, would have sustained about thirty tons, to which they answered they did not recollect. Plaintiff, in rebuttal, introduced in evidence that portion of the witnesses' testimony to which their attention had been called, which showed they did so testify. Their deposition before the coroner had been read to and signed by these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examinations in respect of written instruments: 1 Greenl. Ev. 452-465.

It is also insisted by the defendant the brewing company that the statements and declarations of Dennerty, the superintendent of the ice-machine company, were improperly admitted in evidence. The testimony to which this objection applies is that of the witness Stith, that he had heard Dennerty tell the man who built the tank and brought it to the brewery to put it where the brewing company told him to put it, and to Dennerty's own testimony, that he told Heim that the supports were not strong enough to sustain the weight of the tank. In respect of the latter, it is clearly competent against both defendants, as tending to show that each, prior to the erection of the tank, had notice of the insufficiency of the truss to sustain the weight to which it was to be subjected. The testimony of Stith was clearly competent as against the ice-machine company. Dennerty was its superintendent in charge of the work, and his direction was the direction of his company. If incompetent as against the brewing company, the rule would be, that it must be admitted against the defendant in respect of whom it is competent, and its use and application limited by proper instructions. If the testimony was proper for any purpose, its admission was not error. The plaintiff here sues in a representative capacity, and the defendants, if natural persons, would have been incompetent to testify as witnesses in the cause. The brewing company was a corporation, and Heim, being its president, and a stockholder therein, was interested, and therefore incompetent to testify generally on behalf of the corporation, when called adversely to the plaintiff. At common law, a stockholder, being interested in the event of the litigation, was not allowed

to testify generally in favor of the corporation: *Thrasher v. Pike County R. R. Co.*, 25 Ill. 393.

It is urged that the court erred in refusing to allow the defendant the brewing company to prove its directions to its foreman to build a sufficient truss. This is not error of which that company can complain. Its foreman did afterwards testify, without objection, to the directions given him. But if this was not so, the master is liable for the acts of his servant within the scope of his employment. The act of the servant in providing the structure was, in law, that of his employer, and the servant's failure to obey instructions will not exonerate the master: *Chicago and Northwestern R'y Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; Wood on Master and Servant, 860; Beach on Contributory Negligence, sec. 130; Wharton on Negligence, sec. 232, note; Patterson on Railway Accidents, 329, 330.

We have carefully considered the several points made by counsel, and are of opinion that there is in this record no error requiring a reversal of the judgment of the appellate court, and it will accordingly be affirmed.

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**MASTER AND SERVANT—LIABILITY OF MASTER TO THIRD PERSONS FOR NEGLIGENCE OF SERVANT.**—The master is liable for all negligence of his servants, resulting in injuries to third persons, within the scope of their employment: *Stevenson v. Joy*, 152 Mass. 45; *Charlock v. Freel*, 125 N. Y. 357; and this is true, even though the servants may have acted against the rules and instructions of the master as to the manner of performing their duties: *Pittsburgh etc. R'y Co. v. Shields*, 47 Ohio St. 387; 21 Am. St. Rep. 840, and note; *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738; *Garretson v. Duencel*, 50 Mo. 104; 11 Am. Rep. 405.

**MASTERS AND SERVANTS.**—Where a servant of a master whose business is that of loading cars for a railway company assists the employees of the company in moving a car, and becomes injured through their negligence, he may recover of the company, if his assistance was necessary to expedite his master's business: *Bonner v. Bryant*, 79 Tex. 540.

**NEGLECT, WHEN JOINT—LIABILITY OF PARTIES COMMITTING.**—Parties co-operating in the commission of an act tending toward a common end are jointly and severally liable for negligence concurred in by them, which results in injury to another: Note to *State v. Boyce*, 20 Am. St. Rep. 461; citing *Village of Carterville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248, and extended note 250-257.

**WITNESS, IMPRACHMENT OF, BY CONTRADICTIONARY STATEMENTS.**—When upon cross-examination a witness denies or fails to remember that on a former occasion he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible to impeach him, upon the establishment of a proper and sufficient predicate: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826; *Heddles v. Chicago etc. R'y Co.*, 77

Wis. 228; 29 Am. St. Rep. 106; *Long v. North British etc. Ins. Co.*, 157 Pa. St. 335; *Seiber v. Amanson*, 78 Wis. 679; *Wilson v. Wilson*, 137 Pa. St. 269; *Ancels v. People*, 134 Ill. 401; *Floyd v. Thomas*, 108 N. C. 93; *Omaha etc. Co. v. Tubor*, 13 Col. 41; 16 Am. St. Rep. 185, and note.

## ANDERSON v. GRAY.

[134 ILLINOIS, 560.]

**JURISDICTION.** — A COUNTY COURT IN ILLINOIS, IN THE EXERCISE OF THE COMMON-LAW JURISDICTION conferred upon it by statute, is entitled to the same presumptions in favor of its jurisdiction as the circuit courts, or any other courts of record.

**EXECUTION.** — VARIANCE BETWEEN A JUDGMENT AND AN EXECUTION does not render the latter void, if it is shown to be intended, issued, and enforced as an execution upon the former.

**JUDGMENT AND EXECUTION — VARIANCE.** — That a judgment was entered of an execution issued in favor of James M. for the use of G. W. H., when the only action was by Jane M., for the use of G. W. H., is not fatal to proceedings under such execution and judgment.

**TRESPASSER WITHOUT TITLE CANNOT SET OUT AN OUTSTANDING TITLE** in another.

**TRESPASSER WITHOUT TITLE TAKING POSSESSION OF PROPERTY CANNOT SUCCESSFULLY DEFEND AN ACTION** to eject him by showing that the sheriff's sale, under which the plaintiff held possession, was invalid.

*William A. Spann*, for the appellant.

*A. K. Vickers*, for the appellee.

**WILKIN, J.** This was an action of ejectment, by appellee against appellant, to the April term, 1882, of the Johnson circuit court, to recover possession of the south half of the northwest quarter of section 15, township 12, range 3 east, in said county. Three judgments have been rendered,—the first in favor of plaintiff and the second in favor of defendant, each taking a new trial under the statute. At the April term, 1889, the present judgment was rendered in favor of plaintiff, and defendant appeals.

Both parties proved title in one Owen G. Peterson. Plaintiff claims title from him through a sheriff's sale to George W. Hacker, and deed from said Hacker to himself. To sustain the sheriff's sale, he offered in evidence, first, the record of a judgment in the county court of said Johnson County, rendered at the June term, 1873, the title of the case, as shown by the record, being "Jane Mercer, for the use of G. W. Hacker, v. R. M. Humble and Owen G. Peterson, Def'ts." The judgment was by default, against Owen G. Peterson alone, for \$18.64 damages, and \$84.80 debt, total

amount \$103.44, and costs. It is recited in that judgment that the cause is to "stand continued until the next term of this court as to R. M. Humble, one of the defendants, service not being had in time for the present term of this court." He next offered a record of a judgment of the same court, rendered at the July term, 1873, the title of the case being "James Mercer, for the use of G. W. Hacker, against the same defendants.—Debt." This judgment is against R. M. Humble, for the same amount of damages and debt named in the former judgment. He then offered a certificate of purchase for the lands in suit, to said G. W. Hacker, by the sheriff of said county, in which it is stated that the sale was made by virtue of an execution in favor of James Mercer, for the use of George W. Hacker, and against R. M. Humble and Owen G. Peterson, for \$129.15, debt and interest, and costs; also, a sheriff's deed, dated March 15, 1875, to said Hacker, which recites: "Whereas, James Mercer, for the use of George W. Hacker, did, at the July term, 1873, of the county court of the county of Johnson, recover a judgment against R. W. Humble and Owen G. Peterson for the sum of \$103.45, and costs of suit, upon which judgment an execution was issued," etc., reciting levy and sale thereunder. The amended bill of exceptions shows that he also offered in evidence a deed from said Hacker to himself.

Neither of the records of said judgments in the county court shows affirmatively that the court had jurisdiction of the persons of the defendants when the judgments were rendered, and it is insisted on behalf of appellant that for that reason the judgments are void. County courts in this state, in the exercise of the common-law jurisdiction conferred upon them by statute, are entitled to the same presumption in favor of their jurisdiction as circuit courts. They are courts of record. The practice in them is the same as in the circuit courts. They have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine that jurisdiction. These characteristics distinguish them from courts of inferior, limited jurisdiction, in which jurisdiction in every case must affirmatively appear: *Grignon v. Astor*, 2 How. 319; *Fox v. Hoyt*, 12 Conn. 491; 31 Am. Dec. 763; *Freeman on Judgments*, sec. 122; 4 Am. & Eng. Ency. of Law, 453, and cases cited. The judgments are not void for want of jurisdiction of the person.

The original papers, including the execution on which the sale was made, were shown upon the trial to have been lost. Manifestly, the execution, as shown by the certificate of purchase and sheriff's deed, did not correctly describe either of the judgments offered in evidence, and appellant insists that the variance is fatal. Freeman, in his work on executions, (sec. 43), says: "There is a great distinction between executions issued without authority and executions issued under an authority which is erroneously pursued. . . . The former class is void; the latter may be termed irregular or erroneous. It is necessary that an execution have a judgment to support it, and it should appear from the execution what judgment is intended to be enforced. . . . When the execution is offered in evidence it may vary from the judgment in some respects and correspond with it in others. The question then before the court is, Did this execution issue on this judgment? If, from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued, and enforced as an execution upon the judgment shown to the court, then we apprehend that the writ ought to be received and respected": *Phillips v. Coffee*, 17 Ill. 157; 63 Am. Dec. 357; *Hayes v. Bernard*, 38 Ill. 297.

That there was great irregularity in the proceedings under which the judgments offered in evidence were rendered must be admitted. The evidence clearly shows that there was, in fact, but one suit for the use of George W. Hacker against Peterson and Humble, in that court, on which these two judgments were obtained. The witnesses all speak of the lost papers as "in the case of Jane Mercer, for the use of George W. Hacker, v. O. G. Peterson and R. M. Humble." It is not pretended that there was such a suit as "James Mercer, for the use," etc., pending at the July term of said court. No such papers were lost. It is clear, therefore, that in the suit of Jane Mercer to the June term, both these judgments were entered; that service on Humble not being in time for that term, the plaintiff erroneously took judgment against Peterson, and continued the case as to Humble to the next term, when judgment was entered against him for the same damages and debt, the attempt being, in that way, to make him a party to the judgment. Notwithstanding the manifest error in entering these judgments, the one against Peterson was not void, and we entertain no doubt, from all the facts in

evidence, that the execution under which the sale was made was intended to enforce that judgment. We are therefore of the opinion that by the sheriff's deed to Hacker, Peterson was divested of his title to the premises in question.

It is also shown by the plaintiff below, and not denied by the defendant, that when plaintiff got his deed from Hacker, Peterson was not occupying the premises, though he had previously done so. Plaintiff took possession under his deed, and occupied the premises, by his tenants, for some two years, when the defendant went upon the same and forcibly took possession. So far as the record discloses, he then had no title whatever to the lands. Plaintiff's deed from Hacker was sufficient to protect his possession against a trespasser without title, regardless of the validity of the sheriff's sale to Hacker: *Barger v. Hobbs*, 67 Ill. 592. Being, at the time he took possession, a trespasser without title, appellant could not set up an outstanding title in another: *Jackson v. Harder*, 4 Johns. 203; 4 Am. Dec. 262. This rule is recognized in *Hardin v. Forsythe*, 99 Ill. 312.

Something is said about his having entered under claim of a tax title. There is not the slightest proof of such a title, or even a pretense that the land had at any time been sold for taxes. He does not himself claim that he had title when he took down the fence, drove over the occupant's growing crops, and forced the house open, in which he put his tenant. It appears that in 1884, long after this suit was brought and after it had been once tried, Peterson, then in Texas, executed to appellant a quitclaim deed. There is no evidence whatever that, prior to that time, Peterson, directly or indirectly, set up any claim to these lands, or made any objections to the proceedings under which they were sold. Appellant now seeks to justify his possession under that deed. The court below very properly held that he could not do so.

The judgment of the circuit court will be affirmed.

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**JUDGMENT AND EXECUTION — VARIANCE.** — As to the effect of a variance between an execution and the judgment upon which it was issued, see *Gram v. Price*, 3 A. K. Marsh. 522; 13 Am. Dec. 199, and extended note 201-203.

**TRESPASS — WHAT MAY BE SET UP AS DEFENSE.** — A mere trespasser cannot show title in a third party, as a defense: *Bird v. Liebro*, 9 Cal. 1; 70 Am. Dec. 617, and note; *McColman v. Wilkes*, 3 Strob. 465; 51 Am. Dec. 637, and note; *Omaha etc. Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185, and note; *Thomas v. Hunsucker*, 108 N. C. 720.

# CASES

IN THE

# SUPREME COURT

OF

# KANSAS.

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## GILBERT v. BOARD OF EDUCATION OF NEWTON.

[45 KANSAS, 21.]

**OFFICIAL BONDS—LIABILITY OF SURETIES—JOINDER OF PARTIES.**—Where the treasurer of a board of education gives an official bond upon taking possession of his office, and subsequently, under order of the board of education, gives an additional bond, containing the same conditions as the first, but with different sureties, the sureties on both bonds are properly joined with such treasurer in an action to recover school money which he refuses to turn over to his successor upon the expiration of his term of office; and the board of education, and not his successor, is the proper party plaintiff in such action.

**OFFICIAL BONDS—CONSIDERATION.**—Where the treasurer of a board of education gives an official bond upon taking possession of his office, and is subsequently ordered to give a second and additional bond, because of the insufficiency of the first one, the insufficiency of the first bond is sufficient consideration for the giving of the second.

**OFFICIAL BONDS—LIABILITY OF SURETIES ON TWO BONDS.**—Where the treasurer of a board of education gives an official bond, and afterwards, under order of such board, gives a second bond, with different sureties, and, being general manager of a private corporation, with control of its funds, he deposits both the school and corporate funds in bank, with the knowledge of the bank that such funds are subject to his checks for corporation as well as school purposes, and a deficit exists in the school funds so deposited at the time of the execution of the second bond, the sureties on both bonds are jointly liable for any deficit in deposits of school money subsequently made and remaining unpaid at the expiration of such treasurer's term of office, if he, as manager of the corporation, has deposited sufficient of its money, subsequent to the execution of the second bond, to make good the deficit in school money existing prior thereto.

*Brown and Kline, and Bowman and Bucher, for the plaintiffs in error.*

*Ady, Peters. and Nicholson, for the defendant in error.*



VALENTINE, J. On January 30, 1889, the board of education of the city of Newton commenced an action in the district court of Harvey County against G. W. Holmes, an ex-treasurer of such board, and his sureties on two certain bonds, to recover \$3,857.14, an alleged balance due from Holmes as said ex-treasurer, which he had not at any time accounted for. The defendants, W. G. Pearson, who signed only the first of the aforesaid bonds, and Fox Winnie, A. B. Gilbert, Joseph Gerson, and McKinney Smith, who signed only the second of such bonds, and some of the other defendants, demurred to the plaintiff's petition, upon the grounds,—1. That several causes of action were improperly joined in the action; and 2. That the petition did not state facts sufficient to constitute any cause of action. The demurrers were all overruled. The record shows that Pearson then answered; that a trial was afterward had upon such answer, and that judgment was rendered against him for the amount stated in the plaintiff's petition; but the particulars are not stated. The defendants Winnie, Gilbert, Gerson, and Smith also answered, setting forth in their answers,—1. A general denial; 2. That the bond which they signed—the second bond—was executed without any consideration; 3. That the default of Holmes, if any, occurred prior to the execution of the second bond, and that all the school moneys which Holmes had at the time of the giving of the second bond, or which were afterward received by him, were properly applied and accounted for. A trial before the court and a jury was afterward had between the plaintiff and these four defendants, and judgment was rendered in favor of the plaintiff and against these defendants for the sum of \$3,939.87, with interest and costs. The defendant Pearson, for himself, has filed in this court a petition in error for the purpose of reversing the order and judgment of the district court as against him. The defendants Winnie, Gilbert, Gerson, and Smith have filed another and a separate petition in error in this court for the purpose of reversing the order and judgment of the district court as against them; and these two petitions in error we shall now proceed to consider.

The facts of this case, briefly stated, are substantially as follows: On April 5, 1887, G. W. Holmes was elected treasurer of the board of education of the city of Newton, a city of the second class, and on April 23, 1887, he qualified by taking the oath of office and by giving a proper bond in the sum of twenty thousand dollars, with the defendant Pearson and oth-

ers as his sureties, and he at once entered upon the discharge of his duties as such treasurer. On October 3, 1888, upon the order of the board of education, he gave another bond, in the sum of thirty thousand dollars, with the defendants Winnie, Gilbert, Gerson, Smith, and one other as his sureties. On December 17, 1888, he resigned his office as treasurer of the board of education. Afterward, a successor was duly appointed, and qualified, but Holmes failed and refused to pay over to his successor in office the sum of \$3,857.14, the balance due to the school corporation, and he made default in that amount. During the time while he was treasurer of the board of education he was also the general manager of the Kansas Investment and Guaranty Company, and had the control of its funds; and he also acted for and had the control of funds belonging to other corporations, and also had funds of his own. During that time he deposited in the First National Bank of Newton all the funds of which he had the control, whether they were his own or belonged to the public-school fund, or belonged to some one or more of the other parties for which he did business, and he deposited the same in the name of the Kansas Investment and Guaranty Company. This was all done with the knowledge and consent of the officers of the bank.

1. It is claimed that in this action two causes of action were improperly joined, one upon the first bond and the other upon the second bond. There is some plausibility in the argument of the plaintiffs in error attempting to sustain this claim, and yet, upon the peculiar facts of this case and the authorities cited, we think the claim is not tenable. In the first place, the plaintiff sets up the facts of its case, and asks for relief as though the entire facts of the case could constitute only one cause of action. In the second place, it alleges only one default on the part of the treasurer, Holmes, and that default occurred after the second bond was given, and indeed not until after Holmes has resigned his office; and this default is the only one for which the plaintiff has sought to recover or has recovered in this action. Besides, the condition of the two bonds was and is substantially the same, and all the sureties on the two bonds are equally liable for any and all the defaults made after the second bond was executed, and for the only default for which the plaintiff asked to recover or did recover any judgment. And if any one of the sureties should pay more than his proper share in making

this default or the judgment good, all the other sureties on both the bonds would be equally liable for contribution. Under the authority of the following cases, we do not think that several causes of action were improperly joined in this action: *Holeran v. School District*, 10 Neb. 406; *Powell v. Powell*, 48 Cal. 234.

2. It is further claimed that this action is not prosecuted by the proper party as plaintiff. It is claimed that the treasurer of the board of education, the successor to Holmes, the person who is entitled to the custody of the money when obtained, should be the plaintiff in the action instead of the board of education, which, it is claimed, has no right to the custody of the money. Now, the board of education of a city of the second class, as the plaintiff in this action is, is the general representative of the legal organization created in such cities for the purpose of carrying on and conducting the public schools. Section 4 of chapter 122 of the Laws of 1876 reads as follows:—

“The public schools of each city organized in pursuance of this act shall be a body corporate, and shall possess the usual powers of a corporation for public purposes, by the name and style of ‘The board of education of the city of —, of the state of Kansas’; and in that name may sue or be sued, and be capable of contracting and being contracted with, of holding and conveying such real and personal estate as it may come into possession of, by will or otherwise, or as is authorized to be purchased by the provisions of this act”: Gen. Stats. 1889, par. 5726.

The board of education is the representative of the corporation, the real party in interest, and the treasurer of the board is not: See also Gen. Stats. 1889, among others, pars. 5731, 5737; see also *Coffman v. Parker*, 11 Kan. 9. A school corporation in a city is a school district.

3. It is further claimed that there was no consideration for the second bond, and this for the reason, as is claimed, that the first bond was all that Holmes was required to give, and that the board of education had no power to require him to give any other, further, or additional bond. We think this claim is erroneous. In the first place, the bond originally given, while it may have been sufficient at the time it was given, was clearly insufficient when the second bond was given. The first bond was only for twenty thousand dollars, while at the time the second bond was given, Holmes had over

forty thousand dollars belonging to the school corporation in his possession or under his control; and when the first bond became inadequate, as it did, we think the board of education, as the representative of the school corporation, had ample authority to require, as it did, that Holmes should give another and an additional bond, as he did: See the sections of the statutes above cited, and others.

4. The next thing to be considered in this case has relation to the question whether the default for which the plaintiff recovered in this action occurred, as a fact, prior or subsequently to the execution of the second bond. If it occurred prior thereto, the judgment in this case is evidently erroneous; but if it occurred subsequently, then the judgment is right. It is admitted by the parties that Holmes in fact had \$4,467.47 less of school moneys in his hands and in the bank at the time of the execution of the second bond than he ought to have had; but it is claimed by the plaintiff, and we suppose it is a fact, that more than that amount of money other than school money was afterward deposited in the bank by Holmes and the investment and guaranty company, in the name of the company, in the same manner as the other deposits were made, and that such amount then became, like all the other moneys deposited in the bank by Holmes, subject to the order of Holmes for school purposes, and therefore that any deficit which may have existed at any time after that time would be considered as occurring under the second bond as well as under the first, and the sureties on the second bond would be liable for such deficit as well as the sureties on the first bond. It appears that in all cases when Holmes received school funds he at once deposited them in the exact form in which he received them in the First National Bank of Newton, in the name of the Kansas Investment and Guaranty Company, but they were at all times afterward, while they remained in the bank, subject to his checks for schools and school-corporation purposes. Hence, as the moneys were absolutely under his control, as the treasurer of the board of education, and subject to his checks for schools and school-corporation purposes, they must be considered as school moneys; and as they were actually deposited in the First National Bank of Newton, that bank must be considered as a custodian or depository of the funds for the school corporation. Also, as they were deposited in the name of the Kansas Investment and Guaranty Company with the knowledge and consent of its

general manager, Holmes, and with the knowledge and consent of the banking officers, the Kansas Investment and Guaranty Company must also be considered as a custodian or depositary of the funds for the school corporation. It was a kind of double or joint custody of such funds by the bank and the investment and guaranty company, and both were liable for such funds, for their safe-keeping, and for their return or payment whenever called for by Holmes, as treasurer of the board of education, or by his successor in office, or by any other person or board legally representing the school corporation and having the legal authority to call for the same. Holmes and the investment and guaranty company were certainly at all times liable for this money, and therefore, whenever there was any deficit in the school fund caused by Holmes or the investment and guaranty company drawing the same out of the bank in the name of the investment and guaranty company, any deposit which might be subsequently made by Holmes or by the investment and guaranty company would at once inure to the benefit of the school fund, so far, at least, as to make good any deficit in or any balance due such school fund, and would apply instantly in liquidation and satisfaction of such deficit or balance. Therefore, as there was more than enough money deposited in the bank by Holmes and the investment and guaranty company after the execution of the second bond to make up the deficit which existed at the time of the execution of such second bond, we think the sureties on the second bond were liable for any deficit or default which may have occurred or existed at any time subsequent to the execution of such second bond. In all cases where accounts exist between parties, including bank accounts, a cause of action does not exist with reference to each item of the account, but only as to the balance that may be due to one or the other of the parties; and it exists in favor only of that party in whose favor the balance is due: *Waffle v. Short*, 25 Kan. 503; *Tootle v. Wells*, 39 Kan. 452. And each new item added to the account in favor of the person against whom the balance is due operates as payment or partial payment of such balance; and it will generally operate in payment or partial payment of the oldest item of the account not yet paid or satisfied: *Shellabarger v. Binns*, 18 Kan. 345; 1 Morse on Banks and Banking, sec. 355. Hence, as more than one deficit occurred in the school fund and in the account between the school corporation and Holmes and the

investment and guaranty company and the bank, one of such deficits existing before the execution of the second bond, and the other occurring subsequently thereto, the deposits made in the bank by Holmes and the investment and guaranty company after the occurrence of the first deficit would certainly operate as a payment and satisfaction of that deficit, even if it were made subsequently to the second deficit.

Other questions have been presented by counsel, but we do not think that they require any comment.

The orders and judgments of the court below in both the cases which we have been considering will be affirmed

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OFFICIAL BONDS — ADDITIONAL BONDS. — New bonds given after the original bonds are cumulative, and the new bonds become an additional security for the discharge of such duties as have not been performed at the time they were entered into: *Pools v. Cox*, 9 Ired. 69; 49 Am. Dec. 410, and note.

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## MULVANE v. CITY OF SOUTH TOPEKA.

[45 KANSAS, 45.]

MUNICIPAL CORPORATIONS — LIABILITY FOR INJURY ARISING FROM DEFECTIVE AND UNGUARDED STREET. — One who, in approaching a public street over private property which he has no right to use as a traveled way, and over which the city has no control, is precipitated over an embankment into an excavation in the street, and injured, cannot recover therefor from the city on the ground that the city failed to provide proper danger signals along such excavated street.

MUNICIPAL CORPORATIONS — DUTY TO GUARD EXCAVATED STREET. — A city is not required to put up danger signals along an excavated street as to one traveling outside thereof, except at the crossings or intersections of such street by other public streets or highways.

MUNICIPAL CORPORATION NEED NOT PROVIDE MEANS OF ACCESS FROM PRIVATE PROPERTY to its streets, nor is it liable for failure to guard its streets from approach from such property at dangerous points.

*Welch and Welch*, for the plaintiff in error.

*S. B. Isenhardt*, for the defendant in error.

GREEN, C. The plaintiff in error instituted this suit in the district court of Shawnee County, to recover damages from the city of South Topeka, for a failure to place danger signals at a point where a well-traveled way, which had been used, as he claimed, for more than fifteen years by the traveling public, although not a regularly laid-out road, intersected a street of such city which had been excavated a distance of

some four or five feet below the surface across such traveled way.

At the April term, 1888, the case was tried by a jury, and resulted in favor of the city. The plaintiff below brings the case here, and assigns error in the giving of the sixth instruction, and the refusal of an instruction requested by him. These assignments we shall consider together, as they raise substantially the same question. In the sixth instruction the court said to the jury: "I further instruct you, that before you can find for the plaintiff, you must find from the evidence that, at the time of the alleged accident and injuries complained of, plaintiff was in a public street or public highway in the city of South Topeka. If the plaintiff was not in a public street or public highway when he was precipitated over the bank into the excavation on Kansas Avenue, then he cannot recover. Therefore, if you find that the defendant city excavated the avenue up to the west line of the avenue,—that is, up to the private land belonging to Ritchie or other landowner,—and that plaintiff approached Kansas Avenue across the open private land of Ritchie or other person, and was not in a public street or public highway when the plaintiff and his carriage were precipitated over the bank into the excavation, then the plaintiff cannot recover. The city was not required to put up danger signals at any point along the excavation in the avenue except at the crossing or intersection of the avenue by public streets or public highways; and unless plaintiff approached the avenue by a public street or public highway where it was the duty of the city to put up danger signals, then he cannot recover in this action."

The evidence is not preserved in the record, and we shall assume that the facts authorized the giving of this instruction, which we think is a correct statement of the law. It is stated in the petition that the plaintiff was passing on said by-road entering Kansas Avenue, and was wholly ignorant of the excavation in said Kansas Avenue, and was not aware of any danger, and, while attempting to drive onto said avenue about nine o'clock at night, was accidentally precipitated in said excavation with his team and carriage, whereby he was injured; that the accident occurred by and through the negligence of the defendant city in leaving said excavation on Kansas Avenue, where the by-road entered the same, wholly unguarded in the night-time, by lights or otherwise. Was this such an omission, upon the part of the city, as made it

chargeable with negligence? and was the law as laid down by the trial court correct? We must resolve these questions in favor of the city. There was no obligation resting upon the city to provide a way over private property to its public streets and avenues, and the fact that the ground over which the plaintiff passed had been used by the public for a number of years would not cast upon the city any duty to erect barriers or place danger signals upon such ground, unless the city had full and complete control over the same, as a part of the public streets of the city. There was nothing to indicate that this ground had ever been dedicated to the public, in such a way as to render the city liable, or give the plaintiff any right to use it as a traveled way. It is not the duty of a city to provide means of access from private property to its streets, nor is it liable for a failure to guard its streets from approach, at points where such approach is dangerous: *Goodin v. City of Des Moines*, 55 Iowa, 67; *Zettler v. City of Atlanta*, 66 Ga. 195; *Young v. District of Columbia*, 3 McAr. 137.

The judgment of the district court should be affirmed.

The COURT. It is so ordered.

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**MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY CAUSED BY A DEFECTIVE OR UNGUARDED STREET.**—A municipal corporation is not liable for a place having been left exposed without barriers, when such place can be reached only by leaving the highway and trespassing upon the premises of another: *Clark v. City of Richmond*, 83 Va. 355; 5 Am. St. Rep. 281, and note. Towns are not required to render the road passable for the entire width of the located premises, or to provide safe and convenient access to them from the premises of adjoining owners: *Brown v. Skowhegan*, 82 Me. 273. A city will not be held liable for injuries received by one who fell into an unguarded excavation made by one of its citizens, in order to let water off of his sidewalk: *Flater v. Fey*, 70 Mich. 644.

**MUNICIPAL CORPORATIONS—LIABILITY FOR FAILURE TO PUT DANGER SIGNALS AROUND DANGEROUS PLACE.**—In the absence of notice to its officers, a city will not be liable for failure to place danger signals around a dangerous excavation opened by a citizen to repair his premises: *Lewis v. Atlanta*, 77 Ga. 756; 4 Am. St. Rep. 103, and note.



## HICKS v. NELSON.

[45 KANSAS, 47.]

**TAXATION — VALIDITY OF REDEMPTION NOTICE.** — A notice for the redemption of land sold for delinquent taxes, which gives one day more than the three years allowed for redemption, is not invalid on its face.

**TAXATION — REDEMPTION NOTICE, WHEN WILL SUSTAIN DEED.** — Where notice for the redemption of land sold for delinquent taxes gives one day more than the three years allowed by statute for redemption, and the last day named in the notice is Sunday, a deed of the land following the notice will not be set aside, in the absence of a showing by the owner that he was misled by the notice, and that he offered to redeem on the last day named therein, or if the last-named day was Sunday, on the next day.

**TAXATION — SUFFICIENCY OF REDEMPTION NOTICE.** — A notice to redeem land sold for delinquent taxes which gives the date of sale, from which the expiration of the time for redemption may be computed, is not invalid for uncertainty or indefiniteness in fixing the final day for redemption.

*Malcolm Nicolson*, for the plaintiff in error.

*George G. Cornell*, for the defendant in error.

STRANG, C. Action in ejectment for the possession of the east half of the southwest one fourth of section 8, township 12, range 11, Wabaunsee County, Kansas. Defendants below claim the land under a tax title. The statute provides that "any owner, his agent or attorney, may, at any time within three years from the day of sale, and at any time before the execution of the deed, redeem any land or town lot sold for taxes, or any part thereof, or interest therein, by paying to the treasurer of the county the amount for which said land was sold, and all subsequent taxes and charges thereon," with interest as provided by the act. The statute also requires the county treasurer, at least four months before the expiration of the time limited for redeeming lands sold for taxes, to publish in some paper published in, or of general circulation in, his county, once a week for four consecutive weeks, a list of all unredeemed lands and town lots, describing each tract or lot as the same was described on the tax roll, stating the name of the person to whom assessed, if any, and the amount of taxes charged, and interest, calculated to the last day of redemption, due on each parcel, and give notice that unless such lands or lots be redeemed on or before the day limited therefor, specifying the same, they will be conveyed to the purchaser.

The trial court made the following findings of fact, to wit:—

"1. The plaintiff holds title to the real estate in controversy, to wit: The east half of the southwest quarter of section 8, township 12, range 11 east, containing eighty acres of land in Wabaunsee County, state of Kansas, by a chain of valid conveyances duly executed and delivered, beginning with a patent from the United States, dated April 15, 1871, and ending with a deed to the plaintiff, dated August 18, 1880.

"2. Said real estate was sold on the fifth day of September, 1882, for the taxes of 1881, and under said sale a tax deed, valid on its face, was, on the eleventh day of September, 1885, duly executed and delivered to C. S. Kinderdine, by the county clerk of Wabaunsee County, Kansas, and the defendant Lewis Nelson is in possession of said real estate under title derived from said tax deed, by conveyance duly executed and delivered to him by said Kinderdine on the eleventh day of May, 1886.

"3. Prior to the execution of said tax deed, the county treasurer of Wabaunsee County, Kansas, published a redemption notice of lands sold for taxes in 1882, of which the following is a copy, to wit: —

“ ‘COUNTY TREASURER'S OFFICE,

“ ‘ALMA, WABAUNSEE COUNTY, KAN., Feb. 13, 1885.

“ ‘Notice is hereby given that the lands described in the following list, situate in the county of Wabaunsee and state of Kansas, were sold on the fifth day of September, 1882, for the unpaid taxes of 1881, and costs and charges thereon.

“ ‘The period of redemption under said sale will expire in three years from the day of said sale, or on the sixth day of September, 1885; the sum set opposite the several tracts includes the taxes, interest, and charges up to the last day of redemption.

“ ‘Now, therefore, unless the said lands shall be redeemed on or before the sixth day of September, 1885, they may be conveyed to the purchaser thereof on and after the sixth day of September, 1885.

“ ‘JOSEPH FIELDS, County Treasurer.’

"4. The sixth day of September, 1885, was Sunday.

"5. Before the suit was commenced, the plaintiff tendered to defendant the full amount of taxes and interest on said land."

And the following conclusions of law: —

"1. The defendant Lewis Nelson does not unlawfully detain said real estate from said plaintiff, and said plaintiff is not entitled to recover the possession thereof.

"2. The defendants are entitled to recover their costs."

And thereupon said plaintiff, to all the foregoing conclusions of law, and each of them, duly excepted.

The sole question involved in the case is the sufficiency of the redemption notice. There are two questions raised on the notice. It is first asserted by the plaintiff in error that the notice is not sufficient, because, since the last day of the period for redemption, the 6th of September, is Sunday, the notice should have extended the period for redemption to and including the next day, the 7th. The land was sold on the fifth day of September, 1882. Under the rule of this court (*English v. Williamson*, 34 Kan. 212; *Cable v. Coates*, 38 Kan. 191), the day of sale should have been excluded; the period of redemption, then, would have expired on September 5, 1885. September 5, 1885, was not Sunday, and as the period for redemption expired with that day, it mattered not that the next day was Sunday. The plaintiff had his full three years in which to redeem with the expiration of Saturday, the 5th.

It is argued that, because by the terms of the notice the plaintiff was given the right to redeem on the 6th, he should have had all of that day; and as the 6th was Sunday, he should also have had the whole of the next day, — the 7th. We do not think this argument is tenable. The statute gives three full years in which to redeem, and until the deed is executed; but the notice should give but three years. If, however, the treasurer, by a mistake in computation, gives in the notice one day more than three years for redemption, that will not render the notice invalid upon its face. Nor should the owner be permitted to take advantage of such mistake to set aside a deed following such notice, without showing that he was misled thereby, and that he offered to redeem on the last day named in the notice, or if the last day named was Sunday, on the next day. It is also said the notice was invalid by reason of its uncertainty or want of definiteness in fixing the final day for redemption. That part of the notice claimed to be obnoxious to this criticism reads as follows: "The period of redemption under said sale will expire in three years from the day of said sale, or on the sixth day of September, 1885." It is argued that the date of expiration

for the period of redemption is not definitely fixed; that the notice is, that the period for redemption will expire on one or the other of two periods, to wit, "in three years from the day of sale, or on the sixth day of September, 1885," and that this feature of the notice is subject to the criticism of this court in the case of *Blackstone v. Sherwood*, 31 Kan. 36, and is therefore invalid. The notice in this case differs from the notice criticised in the case cited. In the notice in that case the date of sale was not given, and there was nothing from which to compute the three years for redemption. In this case, the date of sale is given in the notice, and a computation will show when the three years will expire. We think the notice in this case must be held to be good; it is therefore recommended that the judgment of the district court be affirmed.

The Court. It is so ordered.

A rehearing having been asked, the court, in response thereto, said:—

Per CURIAM. It was urged in support of a rehearing of this case that the former opinion was in conflict with *Cable v. Coates*, 36 Kan. 191. *Cable v. Coates* followed *English v. Williamson*, 34 Kan. 212. The opinion, however, in the former case failed to state, as it should have done, that September 4, 1881, was Sunday. In the case of *English v. Williamson*, 34 Kan. 212, it was said that "under the statute above quoted [Civ. Code, sec. 722], when the last day comes on Sunday, that day, as well as the first, shall be excluded, and we suppose our tax laws, as well as all other statutes, were enacted with reference to this rule, and therefore that the rule should govern. Besides, we would also think that such rule should govern, upon general principles. If Sunday, in such a case, is not excluded, the owner of the property would not have the full three years given to him by statute within which to redeem his property from the taxes, while the statutes, in express terms, give him that time, and more than that time."

As September 4, 1881, was Sunday, the owner of the land in the *Cable v. Coates* case had all of September 5, 1881, in which to redeem; but the tax deed was issued in that case at two o'clock, p. m., of September 5, 1881, and therefore was prematurely issued.

With this explanation, the *Cable v. Coates* case is in line

with the *English v. Williamson* case, and the opinion handed down follows both of these cases.

The motion for a rehearing will be overruled.

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**TAXATION — EXPIRATION OF TIME TO REDEEM.** — If the day of the month on which the right to redeem from a tax sale falls is Sunday, it should not be computed, and the owner should be allowed all of the next day in which to redeem: *Gage v. Davis*, 129 Ill. 236; 16 Am. St. Rep. 260, and note. Title will not be presumed to have been acquired under a tax certificate until notice of the time of redemption has been served: *Sanborn v. Mueller*, 28 Minn. 27; *McLellan v. Omodt*, 37 Minn. 157.

**TAXATION — NOTICE OF REDEMPTION — WHEN SUFFICIENT.** — It must state when the land was purchased, in whose name taxed, a description of the land, for what year taxed or specially assessed, and when the time of redemption will expire: *Drake v. Ogden*, 128 Ill. 603.

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## MERRILL v. HUTCHINSON.

[45 KANSAS, 59.]

**DEED — QUITCLAIM, WHEN WILL PREVAIL OVER PRIOR UNRECORDED DEED.**

— A quitclaim deed duly recorded by a purchaser in good faith for valuable consideration, without notice, and after an examination of the records, and the exercise of reasonable diligence to discover outstanding interests, will prevail over a prior unrecorded deed.

*Hellinger Brothers, and Vandever and Martin*, for the plaintiff in error.

*Whiteside and Gleason*, for the defendant in error.

JOHNSTON, J. George Merrill brought this action in the district court of Reno County to recover two lots situate in the city of Hutchinson. Henry King was the fee-simple owner of the lots for several years prior to May 10, 1877, at which time he executed a conveyance of the same to the plaintiff, but the deed was not recorded until more than ten years had elapsed. Merrill now claims title and right of recovery under this conveyance. Hutchinson, the defendant, claims title through certain tax proceedings, and a conveyance made to him by Henry King and wife on July 16, 1885. It appears that King paid the taxes on the lots until 1877, and not being paid for that year, the lots were sold for taxes, and were bid in by the county. No taxes thereon were afterward paid by any one until January, 1883, when the tax certificate was assigned to L. A. Bigger, and a tax deed was executed to him on January 16, 1884, which was recorded on

the same day. Bigger paid taxes thereon up to 1885, and about that time he sold the property to Isaac A. Kitzmiller, but the deed was not executed until March 17, 1886, and it was recorded on March 24, 1886. On April 12, 1886, Kitzmiller and wife conveyed the lots to William E. Hutchinson, and on July 16, 1885, Henry King and wife executed a quitclaim deed, purporting to convey the property to Hutchinson, which instrument was recorded on July 17, 1885.

The plaintiff contends that the tax proceedings were irregular in two respects, and this is not denied by the defendant; and hence we may assume that the tax proceedings alone will not sustain the defendant's claim of title. It is said by the defendant that the court below held against the validity of the tax proceedings; but it is also held that the quitclaim deed of Hutchinson was obtained from King after making diligent inquiry to ascertain the condition of the title, and without notice of the unrecorded deed of plaintiff, and therefore adjudged the quitclaim deed to be superior to the prior unrecorded deed of plaintiff. This is the only question in the case.

It appears that when King conveyed the lots to Hutchinson, he had forgotten the previous conveyance to Merrill, and he supposed that he still held the original title to the lots, and the complete title, except as it was affected by the tax title which had been taken, and which had then passed to Hutchinson. Before purchasing the lots from King, Hutchinson searched the records, and in good faith made diligent inquiry and examination as to the condition of the title, and found nothing indicating the prior conveyance, or that Merrill had or claimed any interest in the property. Kitzmiller had taken possession of the lots and made permanent improvements thereon before the purchase of the same by Hutchinson. None of the parties connected with the tax proceedings, or who paid the taxes, or who took possession and made improvements on the property, knew anything of the prior deed, and Merrill did not disclose the fact until long after the tax deed and subsequent conveyance had been placed on record, nor for a long time after the permanent improvements had been made.

The plaintiff urges that the defendant cannot be regarded as a *bona fide* purchaser, and cites *Johnson v. Williams*, 37 Kan. 179. It was there held that where the grantor gives only a quitclaim deed, the purchaser is put upon inquiry; but

It was not decided that the mere taking of such a deed deprived him from being considered a *bona fide* purchaser under all circumstances. It was said that "a person who holds real estate by virtue of a quitclaim deed only from his immediate grantor, whether he is purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries." In deciding the case, however, it was remarked that "it may be that, with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible, also, that a purchaser taking a quitclaim deed may, under the registry laws, be considered a *bona fide* purchaser with reference to a prior unrecorded deed with respect to which he has no notice, nor any reasonable means of obtaining notice."

The facts of the present case bring it within the suggestion made in the cited case, and we think the rule suggested should be adopted for the determination of this controversy: See authorities cited in *Johnson v. Williams*, 37 Kan. 179. The form of the deed alone did not conclude Hutchinson, nor prevent him from becoming a purchaser in good faith; it simply operated as a warning to him, and put him upon inquiry. It was his duty then to look further, and ascertain why the deed was made without covenants of warranty; and he took it loaded with such outstanding equities or interests as he might have discovered by the exercise of reasonable diligence. As we have seen, he examined the records, inquired of those in possession, and who paid the taxes thereon, and of every one who had any apparent interest in the property, and could not learn from any of them that Merrill had any claim upon the property. And King, the owner of the record title, to whom Hutchinson applied for a deed, had forgotten the conveyance to Merrill, so that it could not be learned from that source. The reason why King gave and Hutchinson took a deed without covenants of warranty was the outstanding tax title, under which parties had taken possession and made improvements; and these circumstances justify the making of a

quitclaim deed, and would naturally set at rest any doubts which might arise in the mind of Hutchinson on account of the form of the deed. He paid a fair consideration for the lots, and although his conduct has been criticised, we find nothing in it to impeach his good faith. It may be remarked that the deed from King purported to convey the property, and did not in terms limit the conveyance to the mere interests of the grantors, nor did it contain any express restriction upon an absolute conveyance. King evidently intended to convey a complete title to the property, except that which had been acquired through tax proceedings, and Hutchinson supposed, and had a right to suppose, that having acquired the rights of the tax-title purchaser, and a conveyance from King, he was vested with a complete and perfect title. The interest of Merrill was so concealed as to be undiscoverable by any reasonable search, and his conduct in the premises does not appeal strongly to the equitable consideration of the court. He purchased the property when it was of little value, and withheld the deed from record for about ten years. During this time he paid no taxes and made no improvements thereon, and did nothing to disclose his ownership. With an unrecorded deed in his pocket, he stood by while others who had obtained deeds placed them on record, erected buildings and other improvements on the lots, and paid accumulated taxes thereon, never intimating that he held an interest in the property. After the value of the property had been greatly enhanced by the improvements made, and by the growth and general prosperity of the city, he uncovers a deed, and asserts title. The act relating to conveyances provides for the recording of all instruments conveying real estate, or whereby any real estate may be affected, and that from the time of filing the same with the register of deeds they shall impart notice to all persons of the contents of the instruments, and that all subsequent purchasers and mortgagees shall be deemed to purchase with notice. It then provides that "no such instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record": Gen. Stats. 1889, para. 1128, 1129, 1130. The duty of placing the deed on record was enjoined by the statute and required by public policy; but the plaintiff ignored both, and it is now too late for him to assert his title against one who purchased in good faith and without no-



tice of the outstanding interest. Even a purchaser at sheriff's sale, other than a judgment creditor, who has parted with value on the strength of the record, and that there are no outstanding equities or titles which are discoverable by ordinary diligence, is entitled to the protection of the recording act. As to him, it has been said: "If the record shows the title clear in a party, and the purchaser has no notice of any outstanding equities or titles, he may, as a rule, safely purchase from such party, and the holder of the unrecorded title is estopped to set up his title as against one who, purchasing, has parted with value on the strength of the record. And this is true, whether the purchaser obtains title from the apparent owner by voluntary conveyance, or purchase at a sheriff's sale": *Lee v. Bermingham*, 30 Kan. 312.

In the same case it is remarked that "every claimant of title owes a duty of notice to the public. Generally speaking, the record is the means of information; and the spirit of our laws is to encourage reliance upon the record. Where that fails, and the claimant knows of the failure, he owes to the public the duty of in some way making good the omission; and if he is derelict in this duty, he may be estopped from afterward setting up his title against one who has purchased and parted with value on the strength of the record."

In *Lewis v. Kirk*, 28 Kan. 505, it is said that "a purchaser in good faith of real estate is never bound to take notice of secret equities, liens, interests, trusts, or encumbrances, which cannot be discovered from an inspection of the public records, or cannot be ascertained by inquiries from the parties in possession. He may always rely upon the public records, and such inquiries as they suggest, and such inquiries as are proper of the parties in possession; and if from all these the title appears to be clear, he will then obtain a good title, although there may be some outstanding equity or lien in favor of some other person."

The defendant acted in good faith, and was not derelict in examining the record or in making inquiries of those in possession or of those likely to know of outstanding equities or titles. The plaintiff, on the other hand, was at fault in failing to give the notice which the law and fair dealing with the public requires. In consequence of his fault, the property was purchased for a valuable consideration, taxes were paid and improvements made thereon, and he who is in fault should suffer the loss which his conduct has occasioned.

We think the title of the defendant under the quitclaim deed is paramount to that of the plaintiff, and the ruling of the district court must be upheld.

The judgment will be affirmed.

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QUITCLAIM DEEDS, RIGHTS OF GRANTEE IN. — The rule in some of the states is, that a grantee under a quitclaim deed takes the interest of his grantor in the premises conveyed, but is not to be deemed a *bona fide purchaser*: *Peters v. Cartier*, 80 Mich. 124; 20 Am. St. Rep. 508, and notes; *Cummings v. Finnegan*, 42 Minn. 524; *Lumpkins v. Adams*, 74 Tex. 96; *Goddard v. Donaha*, 42 Kan. 754. Very similar to the principal case is *Marshall v. Roberts*, 18 Minn. 405, 10 Am. Rep. 201, where the facts showed that the defendant granted certain lands by quitclaim deed to the plaintiff; subsequently, the defendant made a quitclaim deed to L. for the same lands, L. having no notice of the plaintiff's prior deed, which was never recorded. L.'s deed was duly placed on record. The court decided, in an action by plaintiff against defendant for damages, that the plaintiff's interest in the lands was not affected by L.'s quitclaim deed.

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## CALVERT v. WHITMORE.

[45 KANSAS, 98.]

ELECTIONS — IMPERFECT BALLOTS — EVIDENCE OF INTENT. — Ballots cast at an election for "Calvert," "A. L. Calvert," and "J. C. Calvert" may be shown to have been intended to be cast for "G. L. Calvert," when there is but one candidate by the name of Calvert to be voted for at such election.

*J. W. Lewis, and Bagley and Andrews*, for the petitioner.

*D. Overmeyer and W. C. Webb*, for the respondent.

SIMPSON, C. This is an original action in this court. The petition alleges that the plaintiff, G. L. Calvert, is and was a resident of Itasca township, in Sherman County, on the first day of November, 1889; that at the regular election in November, 1889, the plaintiff and the defendant were candidates for the office of justice of the peace in and for said township; that the defendant, Charles W. Whitmore, received 159 votes, and that the plaintiff received 157 votes, and in addition to the 157 perfect ballots that were cast for the plaintiff, the following imperfect votes were cast: One for Calvert, one for A. L. Calvert, and one for J. C. Calvert. He further alleges that the three ballots cast, bearing respectively the names of "Calvert," "A. L. Calvert," and "J. C. Calvert," were meant and intended by the voters so casting them for this plaintiff, G. L. Calvert, and in truth and in fact were so voted

for plaintiff for said office; that in erasing the name of Charles W. Whitmore and writing instead thereof the name of the plaintiff on said ballots, the persons preparing the same meant and intended to write on each of said ballots the name of G. L. Calvert, but by mistake wrote the names as aforesaid; that prior to said election, the electors of said township met in mass convention and nominated as candidates for justice of the peace W. K. Brown, Charles W. Whitmore, and this plaintiff, G. L. Calvert, and that these three persons were the only candidates for said office at said election; that at the time of the election, this plaintiff had an office in the town of Goodland, in said township; that no person bearing the name of A. L. Calvert or J. C. Calvert resided in said township; that the only other person residing in said township bearing the name of Calvert was a farmer residing on a claim in the most remote corner of the township, and who was not a candidate, and who was entirely unknown to the great body of the electors of said township; and that the names of the electors casting the three ballots above named are known to the plaintiff, and are ready and willing to testify that said ballots bearing the names of "Calvert," "A. L. Calvert," and "J. C. Calvert" were so prepared and voted by mistake, but were in fact cast for the plaintiff for justice of the peace. He then alleges the canvass of the vote, the issuance of a certificate of election to defendant; that the plaintiff filed his oath of office, and offered an official bond for approval, demanded the possession of the office, etc.

To this petition a demurrer is interposed because it does not state a cause of action. We think the petition contains every necessary allegation to state a good cause of action on the part of the plaintiff, and therefore recommend that the demurrer be overruled, and the defendant allowed thirty days to answer.

The COURT. It is so ordered.

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ELECTIONS—BALLOTS—EVIDENCE. — As to what evidence is proper to show for whom a ballot was cast by a voter, see *Boyer v Teague*, 106 N. C. 576; 19 Am. St. Rep. 547, and note. When the ballots produced at an election contest are and when not the best evidence of the vote cast: See *Hartman v. Young*, 17 Or. 150; 11 Am. St. Rep. 787, and particularly note 798-800. Parol and extrinsic evidence to explain ambiguities in ballots: See *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312, and particularly note 317-322.

## CONTINENTAL INSURANCE COMPANY v. WILSON.

[45 KANSAS, 250.]

**INSURANCE — ARBITRATION, WHEN OPTIONAL.** — A condition in an insurance policy, providing that any difference of opinion between the insurer and the insured as to the amount of loss may be submitted to arbitration, is not a condition precedent to commencing suit on the policy, but leaves arbitration optional with the parties, and either may decline to arbitrate.

**INSURANCE — WAIVER OF ARBITRATION — ESTOPPEL.** — Where a condition in an insurance policy makes arbitration of loss a condition precedent to suit, and the insured, after loss, demands arbitration, which is refused by the insurer, such refusal constitutes a waiver of arbitration, and the latter is estopped from insisting upon arbitration or from setting up a failure to arbitrate as a defense in an action to recover the loss.

*James D. Snoddy*, for the plaintiff in error.

*W. R. Biddle and H. T. Smith*, for the defendant in error.

**STRANG, C.** March 8, 1887, the plaintiff in error issued its policy of insurance to the defendant in error, promising therein to indemnify him against loss or damage by cyclone in the sum of thirteen hundred dollars, upon his stone dwelling-house, and household effects therein. April 21, 1887, the neighborhood of the defendant in error was visited by a heavy wind-storm, cyclonic in its character, which struck and severely wrecked his house, and also destroyed some of his household goods therein, resulting in a loss to him, as he alleges, of \$1,040, — \$1,000 on his dwelling-house and \$40 on his goods. On the same day he notified the insurance company of his loss by the storm. May 31, 1887, he made and sent to the company proof of his loss. A few days after the storm, Odell and Forward, agents of the company, visited the premises and looked them over. Afterward there was some talk between the defendant in error and the agents of the plaintiff in error about arbitrating the matter, but no arbitration was ever had. January 2, 1888, Wilson began his action in the district court of Linn County. January 12th the insurance company filed its answer, challenging the amount of loss sustained by Wilson, and pleading that by the terms of their policy they had a right to arbitrate the difference between the company and Wilson; that the company had demanded arbitration, and Wilson had refused to join therein, and claiming that as Wilson had refused to arbitrate, he could not maintain his action. The company also claimed an offset in the form of a premium note given by Wilson to the company for fifty-two dollars, and which, they allege, had never been paid. January 22, 1888, a reply was filed confessing the offset

and averring that the plaintiff below was ready and willing to arbitrate, but that the insurance company had refused to submit to arbitration. The case was tried by the court and a jury April 5, 1888. The jury returned a verdict for the plaintiff below, assessing his damages at \$838.95. A motion for a new trial was overruled, and time given to make a case for this court.

As we view the record, there is but one question for this court to determine. The alleged error in the assessment of the amount of damages hardly rises to the dignity of a question, under the oft-repeated decisions of this court, and the evidence in the case. There is certainly evidence to support the finding of the jury in the sum returned by them. Some of the witnesses fixed the amount of damages suffered by Wilson at much more than the amount returned by the jury. The trial court approved the verdict. The real question is, Was Wilson estopped from maintaining his action by any refusal of his to submit the question of the amount of his loss to arbitration, or by failure to submit to the company proper proof of loss? The policy upon which this action is founded requires that the insured shall give the company notice in writing of his loss, in case loss occurs, within fifteen days, and that he make and transmit to the company his proof of loss within sixty days after it occurs. In this case the defendant gave the agents of the company notice the next day after the storm, and forty days thereafter made and sent the company proof of his loss. There is no complaint of want of notice of the loss within fifteen days, and actual notice was given the next day after the storm.

Plaintiff in error does complain of the sufficiency of the proof of loss. As the proof of loss was made and sent to the company May 31, 1887, twenty days before the expiration of the period of time fixed in the policy during which it must be made, and the company held it without making any objection thereto until the 29th of July, 1887, and until long after the time as fixed in the policy for making the proof of loss had expired, it is estopped from making any complaint now: *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 627; *German-American Ins. Co. v. Davidson*, 67 Ga. 14; *Merchants' etc. Ins. Co. v. Vining*, 67 Ga. 661; *Butlerworth v. Western Assurance Co.*, 132 Mass. 489; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; 35 Am. Rep. 77; *Killip v. Putnam Fire Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506; *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis.

160; *Lewis v. Monmouth Mut. Fire Ins. Co.*, 52 Me. 492; *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; 49 Am. Dec. 74; *Mutual Benefit L. Ins. Co. v. Tisdale*, 91 U. S. 238; 43 Barb. 351.

The arbitration clause of the policy reads as follows: "Differences of opinion arising between the parties hereto as to the amount of loss or damage may be settled by arbitration; each party to select one arbitrator, and in case of disagreement, they to select a third, and their award in writing, under oath, shall be binding as to the amount of loss, the cost of said arbitration to be borne by the parties hereto equally."

There is nothing in the above provision to render the arbitration proceeding a condition precedent to the maintenance of an action on the policy for loss sustained under it: *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; 54 Wis. 418; *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338; 4 McCrary, 125. The language of the provision quoted allows arbitration, but leaves it optional with the parties to the contract, and it therefore follows that either may decline arbitration: 2 Wood on Insurance, 1014, 1015.

Counsel argues that the following provision renders the arbitration clause absolute and binding upon the parties, and also makes it a condition precedent: "And it is hereby mutually understood and agreed by and between this company and the assured that this policy is made and accepted upon and with reference to the foregoing terms, conditions, stipulations, and restrictions, all of which are hereby declared to be a part of this contract, and are to be used and resorted to, in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise especially provided for in writing."

This provision adds nothing to the one in relation to arbitration. It simply refers to all preceding "terms, conditions, stipulations, and restrictions," and declares they are to be used and resorted to to determine the rights and obligations of the parties to the policy. It can hardly be claimed that this very general provision at the end of the policy changes any of the preceding terms, conditions, stipulations, and restrictions of the policy, rendering an optional provision

absolute and imperative. It would require a much more definite provision than this one to oust the jurisdiction of the courts. But the contention of the plaintiff in error has been settled against it by frequent decisions of the courts of this country: *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338, and cases there cited. There being nothing in the policy requiring arbitration as a condition precedent to the maintenance of an action thereon by the plaintiff below, it follows that the trial court did not err in holding that evidence in relation to arbitration was irrelevant, and therefore incompetent, nor in taking such evidence from the jury.

There is one other phase of the question to which our attention is called. The evidence shows that the defendant in error, very soon after the injury to his property, notified the plaintiff in error that he wanted to arbitrate the question of damages, and was informed by Odell, agent of the company, that he did not have time then to attend to it; that some days after, he notified Forward, agent of the company, that he wanted to arbitrate, who said, in reply, he'd "be d——d if he would arbitrate"; and added, "You may sue if you want to." If the arbitration provision in the policy in this case required arbitration as a condition precedent, the reply of Forward to Wilson's demand for arbitration would amount to a waiver of the arbitration provision. When, in response to Wilson's demand for arbitration, the company, by its agent, refused to arbitrate, it was estopped from calling on Wilson, subsequently, to arbitrate, and estopped from claiming any right of arbitration thereafter. The company could not decline arbitration when demanded by Wilson, and still hold him to it. The company having declined arbitration, Wilson would have the right to bring suit at once.

It is recommended that the judgment of the district court be affirmed.

The COURT. It is so ordered.

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**FIRE INSURANCE — CONDITIONS FOR ARBITRATION OF LOSSES.** — A condition in a policy of fire insurance providing for arbitration does not make such arbitration a condition precedent to the bringing of an action upon such policy: *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 9 Am. St. Rep. 596, and note; *Hutchinson v. Liverpool etc. Ins. Co.*, 153 Mass. 143; unless clearly made so by the terms of the policy: *Chippewa L. Co. v. Phoenix Ins. Co.*, 80 Mich. 116; *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28; *Gasser v. Sun Fire Office*, 42 Minn. 315. Provisions making arbitration a

condition precedent to suit upon a policy do not apply to cases in which the company denies all liability whatever under the contract: *Bailey v. Etna Ins. Co.*, 77 Wis. 336. An arbitration and award merely as to the amount of loss does not estop the company from denying any legal liability upon the ground that the policy was void for reasons known to the assured at the time of the arbitration: *Johnson v. American Ins. Co.*, 41 Minn. 396.

**FIRE INSURANCE — WAIVER OF CONDITION AS TO ARBITRATION.** — The condition in a policy requiring an arbitration before the institution of a suit thereupon may be waived by the company: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *Nurney v. Fireman's F. Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338; *Morley v. Liverpool etc. Ins. Co.*, 85 Mich. 210; *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

## LONG v. FIFE.

[45 KANSAS, 271.]

**PROCESS — AFFIDAVIT FOR PUBLICATION — AMENDMENT.** — Where the jurisdictional facts necessary to warrant service upon defendant by publication were in existence at the commencement of the action, and the affidavit for publication, otherwise good, is voidable because a material fact is inferentially but insufficiently stated, the court may, either before or after judgment, permit an amended and corrected affidavit for publication to be filed, and when filed it gives the court jurisdiction, and relates back to the time of the commencement of the action.

*H. M. Merriwether*, for the plaintiffs in error.

*John A. Hale*, for the defendant in error.

HORTON, C. J. On the first day of September, 1886, J. O. Fife filed a petition in the district court of Wyandotte County, asking judgment against Mrs. M. A. Hays for one hundred dollars for attorney's fees. A summons was issued on the same day, and returned on the third day of September, 1886, "not found." On the same day on which the petition was filed, an affidavit for publication was filed in the clerk's office of the court, which, omitting caption, is in words and figures as follows:—

"J. O. FIFE, Plaintiff, v. Mrs. M. A. HAYS, Defendant.

"J. O. Fife, of lawful age, being by me first duly sworn according to law, upon his oath says that he is the plaintiff in the above-entitled cause; that defendant is the owner of lot No. 6 in block 79, and lot No. 42 in block 49, in the old city of Wyandotte, now Kansas City, Wyandotte County, Kansas; that this suit is brought for the purpose of recovering the sum of \$100 due affiant from defendant above named; that defendant is a non-resident of the state of Kansas, and



that service of summons cannot be made on said defendant within the state of Kansas. J. O. FIFE.

"Subscribed and sworn to before me this first day of September, 1886. L. C. TRICKEY, Clerk District Court."

On the same day on which the petition was filed, an attachment affidavit was filed, and on the third day of September, 1886, the real estate mentioned was attached, pursuant to the affidavit and the order issued thereon. Proceeding upon the affidavit, publication was made and filed on January 8, 1887. The publication notice, which was published for a sufficient time in the Wyandotte Gazette, a weekly newspaper of general circulation in Wyandotte County, Kansas, omitting caption, was as follows:—

"M. A. Hays, defendant above named, will take notice that she has been sued in the district court of Wyandotte County, Kansas, by J. O. Fife, plaintiff above named, for the sum of \$100, and interest thereon at the rate of seven per cent per annum from April 1, 1885, and that defendant must answer plaintiff's petition on or before the twenty-fifth day of October, 1886, or said petition will be taken as true, and judgment rendered in favor of plaintiff against defendant for said sum and costs, and that lot 42 in block 49, and lot 6 in block 79, all in Wyandotte, now part of Kansas City, Wyandotte County, Kansas, the property of defendant, and heretofore by the sheriff of Wyandotte County attached, will be sold, and the proceeds thereof applied toward the payment of said judgment and costs.

[Signed]

"F. O. FIFE, Plaintiff.

"By JAS. F. GETTY, Att'y for Plaintiff."

On the nineteenth day of January, 1887, the defendant failing to appear, judgment was rendered for plaintiff in the usual form, and on the thirty-first day of May, 1887, the sheriff of the county sold the real estate to James Birmingham. On the sixth day of June, 1887, the sheriff's deed was executed, and the same was filed for record in the office of the register of deeds of the county of Wyandotte on the 18th of June, 1887. On the twenty-eighth day of December, 1886, the real estate in question was sold by Mrs. M. A. Hays and husband to Wingate Jackson. The deed was recorded December 30, 1886. On the sixth day of June, 1887, Jackson sold lot 6, block 79, to H. M. Merriwether, which deed was recorded June 11, 1887, and on June 9, 1887, Merriwether sold lot 6,

block 79, to Juliette U. Long. This deed was recorded June 11, 1887. On the twenty-first day of September, 1887, Wingate Jackson and Juliette U. Long filed their motion to vacate and set aside the judgment, on the ground that the affidavit for publication was essentially defective; that the publication of notice was therefore void; that no other service was had; that defendant did not appear or in any manner waive service, and that consequently the judgment was absolutely void for want of jurisdiction. The district court allowed Fife to file an amended affidavit for publication, on the ground that the affidavit for publication was not void, but voidable only. Thereupon, with leave of the court, an amended affidavit for publication, fully sufficient, was filed. Jackson and Long excepted, and bring the case here.

This court has already decided that if the jurisdictional facts necessary to warrant service upon a defendant by publication were in existence at the commencement of the action, and the affidavit for publication is defective only, and not voidable, the court, after judgment, may permit an amended affidavit for publication to be filed, and such affidavit, when filed, gives jurisdiction to the court, and relates back to the time of the commencement of the action: *Pierce v. Butlers*, 21 Kan. 124; *Wilkins v. Tourtellott*, 28 Kan. 833; *Harrison v. Beard*, 30 Kan. 532.

The affidavit for publication should have stated that the case commenced in the district court was one of those mentioned in section 72 of the Civil Code.

"The rule is, if there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is inferentially or insufficiently set forth, the proceedings are merely voidable": *Harris v. Clafin*, 36 Kan. 543.

The affidavit for publication stated that Mrs. M. A. Hays, the defendant, was a non-resident of the state of Kansas; that service of summons could not be made upon her within the state; that the action was brought for the purpose of recovering from her the sum of one hundred dollars due to the plaintiff, and also set forth a full description of the real estate owned by her in the city of Wyandotte, now Kansas City. This was the property that was attached, and which was subsequently sold to pay the judgment. The fair inference from the affidavit is, that the real estate described

was sought to be taken, or appropriated, for the debt owing from Mrs. Hays; at least, we do not think the omission in the affidavit so vital, in view of what the affidavit did contain, as to render the proceedings void. Therefore our conclusion is, that the court did not err in permitting the amended affidavit to be made and filed.

This case differs from *Harris v. Clafin*, 36 Kan. 543, in which case Mr. Justice Johnston dissented. In that case, nothing was stated in the affidavit for publication about the action being one of those mentioned in section 72 of the Civil Code, no real estate was described or referred to, and no debt was alleged as being owed from the defendant to the plaintiff, or to any one else.

The judgment of the district court will be affirmed.

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PROCESS, AFFIDAVIT FOR, AMENDMENT OF. — An affidavit for an attachment may be amended upon motion: *Maples v. Tunis*, 11 Humph. 103; 53 Am. Dec. 779; note to *Barber v. Swan*, 61 Am. Dec. 129, 130.

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## STATE v. KANSAS MERCANTILE ASSOCIATION.

[45 KANSAS, 351.]

**LOTTERY — DEFINITION.** — A scheme for the distribution of prizes by chance is a lottery.

**LOTTERY — "PLAYING POLICY."** — A scheme popularly and generally known as "playing policy" is a lottery.

**LOTTERY — SCHEME WHICH IS.** — A scheme by which an association sells certificates or tickets for a certain small sum of money which entitle the purchaser to a lead-pencil and the right to select certain numbers which, if drawn from a revolving wheel in which other numbers are placed, entitle the purchaser to a sum of money much larger than the purchase price of the tickets, is a lottery, and unlawful.

*L. B. Kellogg*, attorney-general, for the state.

*S. B. Bradford*, for the defendants.

**HORTON, C. J.** This action is brought under subdivisions 3 and 4 of paragraph 4767 of the General Statutes of 1889. It has for its object the forfeiture of the charter of the Kansas Mercantile Association, and the prevention of the individual defendants from acting as a corporation or exercising corporate rights. The charter states that the purpose for which the corporation was formed is to sell various articles of merchandise with premium numbers attached, the premium numbers entitling purchasers holding the same to a selection

of other articles. The testimony of P. W. Kline, the general manager of the association, shows that the object in obtaining the charter was to enable the association to carry on the identical business which the evidence discloses is carried on by the association. The testimony of witnesses shows that the association has on hand a number of lead-pencils, probably of the value of a small fraction of a cent; that a five-cent investment or a dollar investment in the purchase of one of the "vendor's certificates," as the defendants are pleased to call their tickets, entitles the purchaser to one of these lead-pencils; that the purchaser of a certificate or ticket selects certain numbers, say 8, 9, 13, and hands these numbers into the office of the association, and if all the same numbers come out in the next drawing, the purchaser gets a prize, ranging from forty-five cents to two thousand five hundred dollars; if the numbers selected do not come out, the purchaser gets no prize; that twice a day seventy-eight numbers are placed into a wheel on the stage of Hanson's Opera House, at Kansas City, in this state; that the wheel is revolved for half an hour; that a blindfolded boy draws out twelve numbers at a noon drawing and thirteen numbers at an evening drawing; that such persons as choose to be present at these drawings attend and make up the audience; that the numbers drawn are posted on a blackboard, and are sent to the various agencies in Atchison, Wichita, Leavenworth, St. Joseph, Missouri, and two or three points in Texas, where the association has agencies established for the purpose of assisting in carrying on its business. The business of the association is called and generally known as "playing policy."

Section 3, article 15, of the constitution of the state ordains that "lotteries and the sale of lottery tickets are forever prohibited." Of course, there is no provision in the statute concerning private corporations authorizing the formation of any corporation or association in this state to carry on lotteries or to sell lottery tickets.

Paragraph 4767, General Statutes of 1889, reads: "Such action [in the nature of *quo warranto*] may be brought in the supreme court, or in the district court, in the following cases: . . . 3. When any association or number of persons shall act within the state as a corporation without being legally incorporated; 4. When any corporation does or admits acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when any corpora-

tion abuses its power or exercises powers not conferred by law."

Upon the pleadings and evidence, the sole question is, whether the business carried on by the Kansas Mercantile Association is a lottery. The word "lottery" must be construed in the popular sense, with a view of remedying the mischief intended to be prevented, and to suppress all evasions for the continuance of the mischief.

A "gift sale" of books is a lottery: *State v. Clarke*, 33 N. H. 329; 66 Am. Dec. 723.

A "prize-candy" business is a lottery: *Hull v. Ruggles*, 56 N. Y. 424; *Holoman v. State*, 2 Tex. App. 610; 28 Am. Rep. 439.

"Prize concerts" are lotteries: *Commonwealth v. Thacher*, 97 Mass. 583; 93 Am. Dec. 125; *State v. Overton*, 16 Nev. 136; *Negley v. Devlin*, 12 Abb. Pr. 210.

"Prize tickets" to induce subscriptions to a newspaper constitute a lottery: *State v. Mumford*, 73 Mo. 647; 39 Am. Rep. 532.

"Raffles" at fairs are lotteries: *Commonwealth v. Manderfield*, 8 Phila. 459.

"Drawing works of arts" constitutes a lottery: *Governors of Almshouse v. American Art Union*, 7 N. Y. 228.

"A public exhibition during which, and as a part of the advertised proceedings, presents were distributed among such of the audience as held tickets which answered to the numbers called at will by the exhibitor, held to be a lottery": *State v. Shorts*, 32 N. J. L. 398; 90 Am. Dec. 668.

"When a city or a government, in order to make an inducement for people to buy their bonds, holds out large prizes to be drawn by chance, or determined by lot in the manner in which prizes are usually determined in honestly conducted lotteries, the mailing of circulars concerning such drawings, past and future, is a mailing of lottery circulars": *United States v. Zeisler*, 30 Fed. Rep. 499.

"A scheme for the disposal of town lots, by the terms of which a number of lots are sold, and others are reserved to be distributed by lot among the purchasers of the first portion, so that the chance of obtaining one of the reserved prize lots forms a part of the inducement or consideration for which each purchaser pays the price agreed on for the lot sold to him, is a lottery": *United States v. Olney*, 1 Abb. 275.

"Playing policy" has also been decided in New York to be

a lottery": *Wilkinson v. Gill*, 74 N. Y. 63; 30 Am. Rep. 264. In that case Church, C. J., said that a "lottery" "is defined by Webster, 'a scheme for the distribution of prizes by chance, or the distribution itself'; and he defines 'lot' as 'that which causes, falls, or happens; that which in human speech is called chance, fortune, hazard'; and 'to draw lots' is 'to determine an event by drawing one thing from a number, whose marks are concealed from the drawer, and thus determining an event.' Worcester defines 'lottery' as 'a hazard in which sums are ventured for a chance of obtaining a greater value.' The language of Folger, J., in *Hull v. Ruggles*, 56 N. Y. 424, may be adopted as a result of the accepted definitions: 'Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery.'"

Clearly, the business in which the association is engaged is "a scheme for the distribution of prizes by chance." It has all the essential features of a lottery, and should be so construed. A purchaser of a certificate or ticket from the association does so with the hope or expectation of drawing a prize. His purpose is to try his luck at "fortune's wheel," and not to get a lead-pencil.

Within the definition of Webster and the authorities cited, the purpose of the association and its officers and agents is to establish and carry on a lottery. The purpose expressed in the charter of the association shows that purchasers of merchandise from the association, with premium numbers, were to be entitled to the selection of other articles; that is, prizes. Therefore it is evident that the parties filing the charter and organizing the association intended to carry on "a scheme for the distribution of prizes by chance"; that is, to establish "a lottery." This is unlawful. Such a scheme or business has no warrant of authority from any statute, and is in direct violation of the constitution of the state.

Even if there is no statute prescribing fines or penalties to be inflicted upon persons engaged in carrying on lotteries in the state, yet the constitution is so far self-executing that no charter can be granted or corporation organized in the state for lottery business or the sale of lottery tickets. The alleged charter of the defendant will therefore be declared null and void, and all of the defendants are hereby prohibited from

transacting or carrying on the business, or "lottery," described in the petition.

Judgment will be entered accordingly against the defendants, with costs.

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**LOTTERY, WHAT CONSTITUTES:** See *State v. Boncil*, 42 La. Ann. 1110; 21 Am. St. Rep. 413, and note. In *Long v. Stats*, 73 Md. 527, a sale of parcels of coffee upon each of which was pasted a slip of paper having printed upon the under side thereof the name of some article of merchandise that the purchaser is entitled to was decided to be a violation of the Maryland statute which prohibits "any scheme or device by way of gift enterprises of any kind or character whatsoever."

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## KANSAS CITY v. BRADBURY.

[45 KANSAS, 381.]

**MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — LIABILITY FOR INJURY.** — Where defects in a sidewalk on the streets of a city are known to the officers having charge of the streets, or have existed for such length of time that they could have been known to them by the exercise of ordinary care and diligence, the city is liable in damages to one who is injured by reason of such defects, without fault or negligence on his part.

**INSTRUCTIONS ASKED AFTER THOSE GIVEN** sufficiently cover the facts and issues in the case are properly refused.

**ORDER OF EVIDENCE** is within the sound discretion of the court, and it may even open the case for the purpose of receiving further evidence.

**INSTRUCTIONS — FINDINGS OF FACT.** — Although either party has a right to written findings of the jury upon material questions of fact involved in the case, still, a refusal to submit to the jury an instruction as to "what sum the plaintiff is entitled to recover on account of money paid out for medicine and the services of a physician," in consequence of personal injury, is not sufficient to reverse the judgment in the event of a verdict in favor of plaintiff, when the evidence as to expenses for medicine and medical attendance is uncontradicted.

*W. S. Carroll*, for the plaintiff in error.

*Alden and McGrew, and Scroggs and Gibson*, for the defendant in error.

**HORTON, C. J.** This was an action brought by Mrs. Mary J. Bradbury against the city of Kansas City to recover damages for personal injuries alleged to have been caused on the night of the 29th of August, 1886, by reason of the unsafe and defective condition of a sidewalk on Seventh Street, in that city. It was clearly established by the evidence that Mrs. Bradbury was tripped up and thrown down by a loose board or plank in the sidewalk, and thereby severely and perma-

nently injured. There is no evidence in the record tending to show any contributory negligence upon her part; and the principal question of fact for the determination of the jury was, whether, prior to the injuries complained of, the defects in the sidewalk were known to the officers of the city having charge of the streets, or could have been known by the exercise of ordinary care and diligence upon their part. The jury found specially that the sidewalk was defective where Mrs. Bradbury was injured, and that the defects in the sidewalk had existed about six months before she was injured. The jury also found that the sidewalk was not properly constructed.

It is contended that the board or plank of the sidewalk which caused Mrs. Bradbury to fall was loose for only a short time before her injury. An instruction was asked by the city to the effect that "if the jury believe from the evidence the sidewalk upon which the plaintiff fell and was injured was in a reasonably safe and suitable condition of repair at the time of the alleged injury, save and except the loose board that flew up and tripped the plaintiff, they should find for the defendant."

An examination of the record shows there was evidence supporting the findings of the jury, and therefore we cannot say that there was no proof to sustain the judgment. In this view, the instruction was properly refused. All questions of fact in such a case are for the jury to decide, not the court.

It is also contended that the trial court committed error in refusing various other instructions prayed for. The instructions given sufficiently covered the ground. The facts of the case were in a very narrow compass. Other and further instructions would not have been beneficial, unless the court had explained to the jury what it meant when it referred to "the proper officers of the city having notice of the condition of the sidewalk." The court undoubtedly meant the officers of the city having charge of the repairs of the streets, but the city did not ask the court to define "the proper officers," and the instruction cannot be said to have been erroneous or misleading.

The objection to the order in which the evidence was admitted is not well taken, because in such matters a court has some discretion. A trial court may even open a case for the purpose of receiving further evidence: *West v. Cameron*, 39 Kan. 736; *State v. Sowders*, 42 Kan. 312, and cases there cited.



It is further contended that the court erred in refusing to submit to the jury the following questions: "Q. What sum do you find, if any, that the plaintiff is entitled to on account of money paid for medicine and the services of a physician? Q. What damage do you find, if any, for the plaintiff for loss of time from the performance of her usual labors and duties?"

The court very properly might have submitted the first question. A similar question was submitted in *City of Salina v. Trosper*, 27 Kan. 544. Either party has a right to a written finding upon any particular question of fact involved in the case: *Kansas P. R'y Co. v. Reynolds*, 8 Kan. 623; *Bent v. Philbrick*, 16 Kan. 190; *City of Wyandotte v. Gibson*, 25 Kan. 236. But an examination of the record shows that no material error was committed in the refusal to submit the first question, and no error whatever in refusing to submit the last one.

The evidence as to expenses for medicines and medical attendance was uncontradicted. Mrs. Bradbury testified upon that matter. Her evidence was not controverted. As to the last question, there was no positive or specific statement by any witness of the value of the services of Mrs. Bradbury. She testified that she was a nurse, but did not state what her daily, weekly, or monthly wages were; therefore there was no evidence offered upon which to submit the last question.

Upon the record presented to us, we cannot perceive any error occurring upon the trial prejudicial to the rights of the defendant, and therefore the judgment of the district court will be affirmed.

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**MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — LIABILITY FOR INJURY CAUSED THEREBY.** — Where one is jostled off of a sidewalk more than six feet above the ground, and unprotected by any guard, he may recover from the village whose duty it was to keep it guarded: *Cartersville v. Cook*, 129 Ill. 152; 16 Am. St. Rep. 248, and note. When defective sidewalks in a city cause personal injury, the city is generally liable, if it had proper notice of the defective condition thereof: *Dundas v. Lansing*, 75 Mich. 499; 13 Am. St. Rep. 457, and note; *Roe v. Kansas City*, 100 Mo. 190; *King v. Oshkosh*, 75 Wis. 518; *Fort Wayne v. Breeze*, 123 Ind. 581; *Michigan City v. Ballance*, 123 Ind. 334; *Gaylord v. New Britain*, 58 Conn. 398; *Tice v. Bay City*, 78 Mich. 209; *Campbell v. Kalamazoo*, 80 Mich. 655; *Adams v. Chicopee*, 147 Mass. 440; *City of Wahoo v. Reader*, 27 Neb. 770; *Town of Wheaton v. Hadley*, 131 Ill. 640; *Gillrie v. Lockport*, 122 N. Y. 403; *Ronn v. Des Moines*, 78 Iowa, 63; *Alexander v. Big Rapids*, 76 Mich. 282; *City of Rock Island v. Ovinely*, 126 Ill. 406; *City of Columbus v. Strassner*, 124 Ind. 482; *City of Atlanta v. Alexander*, 80 Ga. 637; *City of Topeka v. Sherwood*, 39 Kan. 690; *Tice v. Bay City*, 84 Mich. 482; *Fuller v. City of Jackson*, 82 Mich. 481;

*Harder v. Minneapolis*, 40 Minn. 446; *Troxel v. City of Vinton*, 77 Iowa, 91; *O'Neil v. West Branch*, 81 Mich. 544; *Moon v. City of Ionia*, 81 Mich. 635; *Bly v. Village of Whitehall*, 120 N. Y. 506; *City of Portland v. Taylor*, 125 Ind. 522.

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## HOLDERMAN v. POND.

[46 KANSAS, 410.]

**CONFLICT OF LAWS — JURISDICTION OF COURTS.** — Where, by the laws of the Indian Territory, the remedy to recover for a wrong done within that territory is confined to the nearest United States court, the court of another state has no jurisdiction to entertain an action for such wrong.

**CONFLICT OF LAWS.** — IF THERE IS NO RIGHT TO RECOVER for an injury in the state or territory where it was inflicted, there can be none in any other state.

**CONFLICT OF LAWS.** — IF A LEASE IS VOID IN THE TERRITORY IN WHICH IT WAS MADE, and cannot support an action there, it is equally void and incapable of supporting an action elsewhere.

*Leroy Neale, A. D. Neale, and H. G. Webb*, for the plaintiff in error.

*F. M. Smith*, for the defendant in error.

GREEN, C. This was an action brought in a justice's court in Labette County, by J. W. Pond, against Marion and Mary Holderman, on the twelfth day of March, 1885, upon the following bill of particulars: "The plaintiff, for his cause of action against the defendants, says that the defendants are indebted to the plaintiff in the sum of \$190, upon an account for 700 bushels of corn at 25 cents per bushel, \$175, and for 60 acres of corn-stalks at 25 cents per acre, \$15. Said defendants took and converted the same to their own use, and said amount is still due. Wherefore plaintiff prays judgment against the defendants for \$190, with 7 per cent interest from January 1, 1885, and costs of suit."

The case was taken to the district court and there tried, and resulted in a verdict and judgment for the plaintiff, and against Marion Holderman, for \$209.88. No service seemed to have been made upon the other defendant. The plaintiff in error filed a motion for a new trial, which was overruled, and he brings the case here for review.

From the special findings of the jury it appears that the land upon which the corn in question grew was situated in the Cherokee nation, in the Indian Territory, and, at the time of the alleged conversion, was fully matured, but ungathered;

and that the defendant purposely caused his stock to be driven to the field where the said corn was standing, to have them feed upon it. It further appears from the evidence that this land had been leased by the defendant to a firm of which the plaintiff was a member, and that he had succeeded to the interest of the firm in such lease; that at the time of the making of the lease, and the alleged conversion of the crop, the plaintiff was a resident of Kansas, and the defendant, who was a "squaw-man," resided in the Indian Territory.

It is contended by the plaintiff in error that at the time of the alleged wrong, no jurisdiction had been accorded to any court outside of the limits of that country, unless one of the parties be an inhabitant of that country and the other an inhabitant outside thereof, either as a plaintiff or defendant, and in that case, exclusive original jurisdiction was then given to the nearest United States district court; that an action of such a character as this cannot be maintained in this state.

Laying aside the question of the right of the plaintiff below to waive the tort, and recover as upon an implied contract, which seems to be well settled upon reason and authority, can the courts of this jurisdiction give the plaintiff below a remedy for a wrong committed in the Indian Territory, when there is a quest on as to whether there was a remedy there? The primary right of the plaintiff below to recover rested upon a tort committed where the remedy was confined to the nearest United States district court, which had exclusive original jurisdiction. Could the plaintiff below, "upon the theory of the implied promise and its infraction," recover in this jurisdiction for a wrong committed where the jurisdiction is restricted to the federal court, if, indeed, any remedy existed at all?

We think the tort charged, and the right and remedy growing out of such tort, must be determined by the law of the territory where the wrong was committed. The rule is well settled that if there is no right to recover for an alleged injury in the state or territory where it is said to have been committed, there can be none in any other state; and if the state in which the alleged injury is committed has declared the consequences and defined the liability therefor, that law must govern: *Campbell v. Rogers*, 19 Law Rep. 329.

By the seventh article of the treaty between the United

States and the Cherokee nation, proclaimed August 11, 1866 (14 U. S. Stats. at Large, 800), it is provided that the United States district court the nearest to the Cherokee nation shall have exclusive original jurisdiction of all civil and criminal cases. We think this provision of the treaty settles the jurisdiction of this case.

Section 2103 of the Revised Statutes of the United States makes void all contracts for the leasing of land in the Indian country, unless executed in the manner therein provided and approved by the Secretary of the Interior. The lease between Pond and Holderman was in violation of this law, and conferred no rights upon Pond to cultivate the land; he was there without authority. The question naturally suggests itself, whether or not, under such a state of facts, he could have maintained an action, in any form, against the defendant below in the Indian Territory. If he could not there, he should not be permitted to do so here. He can obtain no greater rights here than he had there. In order to maintain an action founded upon an injury to person or property, the act which is the cause of the injury or damage, and the foundation of the action, must be actionable, or punishable at least, by the law of the place where the injury was done: *Cooley on Torts*, 471; *Wharton on Conflict of Laws*, sec. 478; *Holland v. Pack*, Peck, 151; *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400; *Smith v. Condry*, 1 How. 28; *McLeod v. Connecticut etc. R. R. Co.*, 58 Vt. 727; *Carter v. Goode*, 50 Ark. 155. In the latter case, Goode sued Carter in Arkansas, to recover damages for an injury to a mule. It was proved upon the trial that the injury was committed in the Cherokee nation, where Carter and Goode were at the time residing; that they were citizens of Arkansas and had no permit to reside in the Indian country; that at the time the injury was inflicted, the mule was trespassing in Carter's inclosure, which Goode knew it was in the habit of doing; and that Goode had no redress whatever for the injury; and that the act was not punishable in the Indian Territory. The court held that the action could not be maintained, because the act which caused the injury was not punishable or actionable by the law of the place where it was committed.

As the plaintiff below had no permit or license to lease the land where the corn was raised, and there being grave doubts whether he had any right to recover for the alleged conversion of this property in the Indian Territory, where the tort

was committed, and if such right did exist, the jurisdiction was vested in another court, we think it follows from such a state of facts that the trial court had no jurisdiction.

We recommend a reversal of the judgment.

The COURT. It is so ordered.

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**ACTION, WHEN MAINTAINABLE, THE INJURY HAVING BEEN RECEIVED IN ANOTHER STATE.** — In order to maintain an action of tort founded upon an injury to person or property, the act which is the cause of the injury, and the foundation of the action, must be actionable, or punishable at least, by the law of the place where the injury is done: *Carter v. Good*, 50 Ark. 156; *Wooden v. Western etc. R. R. Co.*, 126 N. Y. 10; 22 Am. St. Rep. 803, and note; *St. Joseph etc. Co. v. Leland*, 90 Mo. 177; 59 Am. Rep. 9. And the law of the state where the tort is committed, relating to the rights and liabilities of the parties, must govern the court, where the action is brought in another state: *East Tennessee etc. R. R. Co. v. Lewis*, 89 Tenn. 235.

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## SMITH v. DAVENPORT.

[45 KANSAS, 423.]

**INFANTS — LIABILITY OF FATHER FOR TORTS OF.** — A father is never liable for the wrongful acts of his minor child, unless they are committed with the father's consent or in connection with the business of the latter.

*W. D. Webb*, for the plaintiffs in error.

*James Falleon*, for the defendant in error.

**VALENTINE, J.** This was an action brought in the district court of Brown County by Susan E. Smith and her husband, Joseph Smith, against A. G. Davenport, for personal injuries sustained by Mrs. Smith, in consequence of the acts of Albert Davenport, a minor son of the defendant, eleven years old, in riding over her with a horse. The case was tried before the court and a jury, and at the close of the plaintiffs' evidence the defendant demurred thereto upon the ground that it did not prove any cause of action, and the court sustained the demurrer, and rendered judgment for costs in favor of the defendant and against the plaintiffs; and the plaintiffs, as plaintiffs in error, bring the case to this court.

The facts of the case, stated briefly, are substantially as follows: On September 18, 1885, in the afternoon, the defendant directed his son Albert to hunt for a colt that had strayed away from their premises. The boy procured a pony mare belonging to Mr. Cochran that was kept on the premises, and proceeded to hunt for the colt, but not finding it, he returned

that same afternoon about sundown. The mare was then fed by the hired man, and in about one half-hour afterward the boy went on foot to the house of Mr. E. D. Lacroix, about half a mile distant, to inquire concerning Lacroix's health. About the same time, a little brother of Albert's, about eight years old, named Byron, and another little boy, named Johnny Nelson, who was about nine years old, rode Mr. Cochran's pony mare to Mr. Lacroix's house. Albert went to the house, and made his inquiry. The other two boys, with the mare, remained at the gate. They then came inside of the inclosure between the house and the gate. They then got off the mare and Albert got on, and rode her upon a "lope" toward the gate, and arriving near the gate, the pony changed her course and ran back, and in doing so ran against and over Mrs. Smith, and injured her; and then the mare changed her course again and ran toward the gate, and getting near the gate she stopped suddenly and threw the boy off and over her head. Albert was not sent to Mr. Lacroix's house by his father. These are substantially all the material facts in the case.

We shall assume, for the purposes of this case, that Albert Davenport committed an actionable tort, for which he himself was liable; for infants as well as others are liable for all the injuries to either person or to property which they themselves wrongfully commit: 10 Am. & Eng. Ency. of Law, 668. But the question arises, Was the father, A. G. Davenport, liable for the wrongful acts of his son? This question must be answered in the negative: *Edwards v. Crume*, 13 Kan. 348, 350, and cases there cited; *Baker v. Morris*, 33 Kan. 580. A father is never liable for the wrongful acts of his minor son, unless the acts are committed with the father's consent, or in connection with the father's business. In the present case, the son was not performing any act for his father. He was not directed by his father to go to Lacroix's house. It does not appear that he was even there with his father's knowledge. And what he did had no connection with his father's business.

The judgment of the court below will be affirmed.

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INFANTS, TORTS OF, LIABILITY OF PARENT FOR. — A parent cannot be held liable for the willful trespasses and torts of his infant child, when he neither assents to nor ratifies them, even though he had notice of the child's vicious and destructive temper: *Paul v. Hummel*, 43 Mo. 119; 97 Am. Dec. 381, and note; *Hagerty v. Powers*, 66 Cal. 368; 56 Am. Rep. 101; note to *Hoverson v. Noker*, 50 Am. Rep. 383-386.

**GALE SULKY HARROW MANUFACTURING COMPANY  
v. STARK.**

[45 KANSAS, 606.]

**SALE—BREACH OF WARRANTY AS DEFENSE TO ACTION ON NOTE—RESCISSION.**—In an action to recover on a note given to secure payment for a farming implement, and containing a condition that "no promise or contract outside of this note will be recognized," the defendant and maker of the note may allege and prove that the implement was sold under a warranty that it was sufficient for a particular purpose, which warranty wholly failed, and that he offered to return the implement, and rescinded the sale.

**SALE—RESCISSION—BREACH OF WARRANTY.**—Where a farming implement sold under a warranty is materially different from what it is warranted to be, and will not serve the purpose for which it is warranted, the vendee may return it and rescind the sale, notwithstanding that the note which he gave to secure the payment of the purchase price contains a provision that "no promise or contract outside of this note will be recognized."

**ACTION** on a note given by the defendant to plaintiff. The defendant, in answering, alleged that the note was given in payment for a Gale sulky harrow and seeder sold him by plaintiff and warranted to do good work, that such warranty was relied upon, and that it wholly failed. Judgment for defendant, and plaintiff appealed.

*Jones and Shultz, and C. W. Shinn, for the plaintiff in error.*

*W. S. Marlin, for the defendant in error.*

**VALENTINE, J.** In this action we think the defendant had the right to prove a parol warranty of the sufficiency of the implement purchased for the purpose for which it was purchased, notwithstanding the words contained in the instrument sued on, to wit: "No promise or contract outside of this note will be recognized.—Isaac Stark." Upon the face of the note it would seem that Stark, the promisor, the one who signed the note, would be the person who would not recognize any other promise or contract outside of the note: See also *Thompson v. Wheeler etc. Mfg. Co.*, 29 Kan. 476. We think there was also sufficient evidence from which the jury might find a warranty. The implement was sold, however, by an agent of the plaintiff; but as such agent had the entire control of the property, and assumed to have the right to make the warranty, and as the defendant had no notice to the contrary, and as a warranty at least to the extent of the price of the property would seem to be within the scope of

the agent's authority, and as the company afterward accepted the fruits of the agent's sale, we would think that the facts would authorize a holding that the agent did have sufficient authority to make the warranty. We also think that the defendant had a right to prove a rescission of the contract of purchase and sale, and his offer to return the property to the plaintiff. Upon this question there is a conflict of authority. Some courts hold that where the title to the property has passed to the vendee, and no fraud can be shown on the part of the vendor, but only a breach of the warranty, the vendee cannot rescind the contract; but other courts hold otherwise, and this court seemingly holds otherwise: *Weybrich v. Harris*, 81 Kan. 92. In the case just cited, it is held that the vendee has one of two remedies: 1. He may return the property and rescind the contract; or 2. He may affirm the contract and sue for damages for the breach of the warranty. In 8 Am. & Eng. Ency. of Law, 929-931, the following language is used: "A contract may be rescinded when the entering into the same has been induced by a false representation, fraudulent or otherwise, made by a party thereto, provided such representation be one of fact (this rule does not apply to cases of actual fraud) as distinguished from either matter of law or mere opinion or intention, — that it be such as to induce the contract, and that it be made as part of the same transaction. Such a contract, however, is voidable, and not void, and cannot be rescinded if the parties cannot be put *in statu quo*, nor after third persons have for value acquired rights thereunder; and the rescission must take place within a reasonable time, notice of the election to rescind having been communicated to the other party, though this may be done by bringing suit to have the contract set aside. Otherwise the right of rescission will be considered waived by acquiescence."

We think this is a correct statement of the law, although there are some authorities to the contrary: See 1 Benjamin on Sales, 4th (Corbin's) Am. ed., secs. 623-635, and especially secs. 628-634. It is not necessary in this case that we should hold that in all cases of a breach of warranty in the sale of personal property the vendee may return, or offer to return, the property and rescind the contract, but we think that such is the rule for cases like the present, where the property purchased and received is substantially different from what it was warranted to be, and will not answer the purpose for which it was warranted. It must also be remembered that in the present case



nothing had been paid for the property when the contract was rescinded, but only a promissory note had been given for the purchase price thereof. Of course, an offer to return the property, where the offer is refused, answers the same purpose as an actual return, provided that the property is retained for the benefit of the vendor whenever the vendor may choose to receive it. In this case the vendee offered to return the property, and then kept it for the plaintiff, and at all times he kept it just as safely and as well as he kept his own property. The offer to return the property was on two different occasions, and to two different agents of the plaintiff. On the first occasion, the agent had the note sued on in his possession, and was attempting to collect the same. On the other occasion, the agent was at the defendant's house, attempting to collect the note, and while the implement was present and in sight of both the agent and the defendant, the defendant offered to return the same. The plaintiff itself was a non-resident of the state of Kansas, and a resident of Detroit, Michigan, and it does not appear that the plaintiff had any resident agent in Kansas to whom the property could be returned, until about the time when the defendant offered to return the same, and the defendant offered to return the same just as soon as he could find any agent of the plaintiff to whom he could make the offer.

Many objections are made by the plaintiff to the instructions given by the court to the jury, and to its refusal to give other instructions asked for by the plaintiff; but still we think the case was fairly submitted to the jury upon proper and sufficient instructions.

The principal questions involved in this case, as it was tried in the court below, were, whether the implement sold by the plaintiff's agent to the defendant was warranted to be sufficient for a particular purpose or not, and whether it was in fact sufficient for such purpose, or was essentially insufficient. These questions were questions of fact, and we think they were fairly and properly submitted to the jury; and the jury found against the plaintiff and in favor of the defendant; and the court below approved the verdict, and we do not now think that we can disturb such verdict. The agent who sold the property to the defendant seems to have been an itinerant salesman, who could not afterward be found by the defendant; nor could any agent of the plaintiff be found by the defendant until the note sued on was presented to him for

collection; and the defendant did not even know where the place of business of the plaintiff was.

We cannot say that any material error was committed by the trial court, and therefore its judgment will be affirmed.

**SALES—BREACH OF WARRANTY—RESCISSON.**—The purchaser of a piece of machinery under a warranty, with the right of examination, may, upon a breach of the warranty, rescind the contract of sale: *Davis v. Sweeney*, 75 Iowa, 45; *Ward v. Robertson*, 75 Iowa, 535; *Aultman v. Mickey*, 41 Kan. 342; *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; *Bryant v. Ishurry*, 13 Gray, 607; 74 Am. Dec. 655, and note; *Wootle v. Whitney*, 23 Wis. 55; 99 Am. Dec. 102; *Wood etc. Co. v. Smith*, 50 Mich. 565; 45 Am. Rep. 57; but he must return the machine: *Cookingham v. Dusa*, 41 Kan. 229; and it must be in an undamaged condition: *Bradley v. Palen*, 78 Iowa, 126.

**SALES—PURCHASE NOTES—BREACH OF WARRANTY.**—A breach of warranty is a defense to a note given for the purchase-money of property sold under a warranty, even though the note was executed subsequent to the time the contract of warranty was made: *Falconer v. Smith*, 18 Pa. St. 130; 55 Am. Dec. 611; *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 288. A note, having been executed for the price of personalty sold to the maker under an agreement that the sale was to be absolute upon a certain contingency, is rendered valueless by a reclamation of the personalty by the seller because of the non-happening of the contingency: *Folking v. Huckabay*, 67 Miss. 206. One cannot defeat a purchase-money note upon the rescission of the contract of sale, unless he returns the personalty sold: *Upper San Joaquin etc. Co. v. Renck*, 78 Cal. 552. A breach of warranty in a contract of sale of personalty becomes immaterial as a defense to a purchase-price note, when a failure of consideration has been shown: *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 289; *Bruce v. Wellon*, 99 Mo. 564.

## BOARD OF COMMISSIONERS OF LINN CO. v. SNYDER.

[45 KANSAS, 636.]

**CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—STATUTE AUTHORIZING PAYMENT OF A CLAIM NOT CONSTITUTING LEGAL OBLIGATION.**—The fact that a claim against a municipal or public corporation is merely equitable, and not such as the law recognizes as a legal obligation, forms no constitutional objection to the validity of a law imposing a tax and directing the payment of the claim thereby.

**CONSTITUTIONAL LAW—STATUTE AUTHORIZING PAYMENTS BY MUNICIPAL CORPORATION.**—A statute authorizing a certain township to vote bonds to repay citizens of such township money advanced by them to aid in the construction of a county court-house is constitutional and valid, though but for such statute the citizens making such advances would be without legal means of redress.

*W. R. Biddle and Howard T. Smith*, for the plaintiffs in error.

*Stephen H. Allen*, for the defendant in error.

GREEN, C. This was an action brought in the district court of Linn County, to perpetually enjoin and restrain the board of county commissioners of Linn County from levying a tax to pay the interest upon certain bonds issued under chapter 236 of the Laws of 1887. It is disclosed in the record before us that prior to the year 1885, Linn County was the owner of a tract of land in Mound City known as the Public Square; that during that year, upon the application of citizens of the township in which Mound City is situated, leave was granted by the board of county commissioners of the county to build a court-house on such Public Square; that certain citizens procured subscriptions from other citizens of the township, for the purpose of erecting a court-house; that a committee of citizens then proceeded to and did erect the walls of a suitable building for a court-house, and put on a roof, but no floors were laid, and no doors or windows were put in; that after the erection of the walls of said building, and during the year 1886, the building in its unfinished condition was formally donated to the county, and accepted by the board of county commissioners as a court-house, and taken possession of and completed at the expense of the county, and has since been used as a court-house and for no other purpose; and that the building and grounds belong to Linn County. The building cost, in the condition it was donated to the county by the citizens' committee, fourteen thousand five hundred dollars, which had been contributed by various citizens of the township. In the year 1887, the legislature passed (chapter 236) an act to authorize Mound City township, in Linn County, to vote bonds not to exceed seventeen thousand dollars, to reimburse citizens of said township for sums advanced by said citizens to aid in the construction of a court-house in Mound City. Subsequently, an election was held in the township, and it was determined by a vote of 240 for to 143 against that the bonds of the township should be issued for \$14,500, and the vote was duly canvassed by the board of county commissioners, and the bonds issued, showing upon their face that they were issued under the authority of chapter 236 of the Laws of 1887. This suit was commenced by a tax-payer of the township, and the court below granted a perpetual injunction against the defendants below, restraining them from levying a tax to pay any interest on the bonds issued under said chapter 236, holding that the same was un-

constitutional. The plaintiffs in error bring the record here for review.

It is urged that the legislature had the right to authorize the township to issue its bonds for the purpose designated, notwithstanding the fact that there may have been no legal obligation resting upon the township to refund the different sums subscribed and paid by the various citizens to be used in the construction of this court-house. The proposition involved is, whether or not this law, which recognizes the right and authorizes the municipality, upon a vote of the people, to assume and pay certain obligations of an equitable character, can be upheld. One of the canons of constitutional construction in this state is, that no slight difference of opinion will authorize the judiciary to set aside the action of the law-making power, or to nullify an act of the legislature. The judicial department should not interfere with the legislative conscience, unless there be a clear violation of some provision of the constitution: *State v. Barrett*, 27 Kan. 213. Text-writers and courts of the highest legal learning and respectability have said that the fact that a claim against a municipal or public corporation is not such a one as the law recognizes as a legal obligation forms no constitutional objection to the validity of a law imposing a tax and directing its payment: 1 Dillon on Municipal Corporations, 4th ed., sec. 75; *United States v. Baltimore etc. R. R. Co.*, 17 Wall. 322; *New Orleans v. Clark*, 95 U. S. 644; *Shaw v. Dennis*, 10 Ill. 405; *Dennis v. Maynard*, 15 Ill. 477; *Layton v. New Orleans*, 12 La. Ann. 515; *Carter v. Cambridge etc. Bridge Prop'rs*, 104 Mass. 236; *Thomas v. Leland*, 24 Wend. 65; *Town of Guilford v. Supervisors*, 13 N. Y. 143; *Brewster v. City of Syracuse*, 19 N. Y. 116; *Darlington v. Mayor*, 31 N. Y. 164; 88 Am. Dec. 248; *Brown v. Mayor*, 63 N. Y. 239; *Mayor v. Tenth Nat. Bank*, 111 N. Y. 446; *Sinton v. Ashbury*, 41 Cal. 525; *Creighton v. San Francisco*, 42 Cal. 446; *Lycoming v. Union*, 15 Pa. St. 166; 53 Am. Dec. 575; Cooley's Constitutional Limitations, 258.

The reasoning in the adjudicated cases cited is, that the legislature may determine what moneys may be raised and expended, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels a municipality to pay a claim which has some meritorious basis to rest upon. From the numerous authorities upon the question of legislative control over municipalities, Judge Cooley lays down the following

proposition: "That the legislature has the undoubted power to compel the municipal bodies to perform their functions as local governments under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them as such, whether they be legal, or merely equitable or moral; and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient": Cooley's Constitutional Limitations, 238.

The court of appeals of New York recognizes the doctrine of large legislative discretion upon the question of raising and appropriating public money, and of imposing a tax upon towns and other municipal or political divisions, whenever it will be promotive of the public welfare. The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude and charity. Independent of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax-paying citizens of the state, or among those of a particular section or political division: *Town of Guilford v. Supervisors*, 13 N. Y. 143.

In speaking upon this same subject, in the case of *Booth v. Woodbury*, 32 Conn. 118, Mr. Justice Butler said: "To make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied." In the case of *Sinton v. Ashbury*, 41 Cal. 525, Crockett, J., stated the rule: "It is established by an overwhelming weight of authority, and I believe is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it."

The law challenged in this case is not subject to the objections urged in the numerous cases cited. The act in question provided that the bonds of the municipality should not be issued for these assumed obligations until the question had been submitted to the people of the township, at an election called for that purpose. The notice of such election had to contain a statement of the purpose for which, and the conditions under which, bonds were to be issued. The legislature having said that these obligations might be paid, and a majority of the legal voters of the township having decided that it was just and equitable that such subscriptions to the court-house fund should be assumed by the municipality, we cannot see that the law is subject to any constitutional objection.

Following the maxim which we regard as the true and correct rule, that there should be great caution in arriving at a conclusion adverse to the validity of a legislative act, and believing that the law in question is within the constitutional power of the legislature to pass, we recommend a reversal of the judgment of the trial court.

The COURT. It is so ordered.

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MUNICIPAL CORPORATIONS—POWERS OF LEGISLATURE.—As to the power of the legislature to validate invalid contracts of and to impose liabilities upon municipal corporations, see note to *Hasbrouck v. Milwaukee*, 80 Am. Dec. 731-735, wherein is discussed the power of the legislature to compel the payment by a city of equitable or moral obligations. Compare note to *Darlington v. Mayor etc. of New York*, 88 Am. Dec. 286, 287; *Deas v. Churilton*, 23 Wis. 590; 99 Am. Dec. 205.

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## STEWART v. BOARD OF COMMISSIONERS OF WYANDOTTE COUNTY.

[48 KANSAS, 708.]

INJUNCTION TO RESTRAIN COLLECTION OF TAX—IMPROVEMENT OF COUNTY ROAD—ESTOPPEL.—A land-owner who institutes proceedings which lead to the improvement of a county road contiguous to his land, and who is a willing and active consenting party to the whole proceedings, is not entitled to an injunction to stay the collection of a tax against his property to assist in paying for such improvement; and he is also estopped from questioning the legality of such tax, whether it is legally valid or not.

INJUNCTION TO RESTRAIN COLLECTION OF ILLEGAL TAX—ESTOPPEL—IMPROVEMENT OF COUNTY ROAD.—A land-owner who signs, circulates,

and presents a petition asking for the improvement of a county road contiguous to his land, who lives in the vicinity and is present at times as the work progresses, and who knows that the petition is not legally sufficient to authorize such work, is estopped from asserting its illegality as a ground of obtaining an injunction to stay the collection of a tax levied on his land to assist in paying for such improvement.

**ESTOPPEL — IMPROVEMENT OF COUNTY ROAD.** — A land-owner who actively aids in procuring improvements to a county road contiguous to his land, and accepts the benefit after the improvement is made, is estopped to question the validity of the proceedings under which the improvement was made.

**INJUNCTION TO STAY COLLECTION OF ILLEGAL TAX — ESTOPPEL — EQUITABLE JURISDICTION.** — Although a statute may give an enlarged or additional remedy to a tax-payer to prevent the collection of a tax illegally assessed, yet if it is shown that the principles of estoppel apply against the tax-payer, the jurisdiction conferred by the statute is to be exercised upon equitable principles, and the tax-payer, in order to be entitled to an injunction, must exhibit a case which will entitle him to the equitable relief demanded.

*Hutchings and Keplinger*, for the plaintiff in error.

*J. B. Scroggs, J. O. Fife, A. L. Berger, and Winfield Freeman*, for the defendants in error.

**HORTON, C. J.** In the former opinion handed down in this case, prepared by Simpson, C., it was asserted that Martin Stewart, the resident land-owner, who signed the petition for the improvement of the county road complained of, was not estopped by his acts or conduct from successfully prosecuting his action of injunction to restrain the collection of the special taxes levied on his land to pay the cost of grading and paving the county road known as the Quindaro Boulevard. We have re-examined that opinion and various decisions affecting the question involved, and we are now of the opinion, without passing upon the constitutionality of the statute, that facts are disclosed in the record which amount to an estoppel against Stewart. The special facts found by the trial court show that Stewart lived in the immediate vicinity of the work during its entire progress; that he was present upon the work at different times; that he signed the petition presented to the county board, and circulated and filed it with the board; that he knew the contents of the petition; that he knew a majority of the resident land-holders within the half-mile limit had not signed the petition; that he presented the petition to the board, and asked that the improvement be made; that he knew of the fatal defect in the petition; that he knew that his property would be taxed for the improvement; that he

knew at the time the work was being done that one-inch cypress plank was being used therefor; that he complained to the commissioners about using one-inch instead of two-inch plank; that at the time the apportionment was made, he filed a protest against the cost being taxed to him; that his property lies contiguous to the improved road, and was greatly enhanced in value by reason of the improvement, much in excess of the tax imposed upon him for the improvement.

In *Sleeper v. Bullen*, 6 Kan. 300, it was decided that "a contract made by the city council, under chapter 70, Laws of 1867, for grading a street in Leavenworth City, without a sufficient petition having first been presented to the council, is, and all the proceedings under such contract are, void as against the lot-owners. A lot-owner who has notice of all the proceedings and makes no objection, but, on the contrary, encourages the contractors to do the grading, and tells them that they shall be paid therefor, is not entitled to an order of injunction to restrain the collection of a special tax levied on his lots to pay for said grading."

In *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624, it was held in New York that "a party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the constitution had secured him a trial by jury."

In *Ferguson v. Landrum*, 5 Bush, 230, 96 Am. Dec. 350, it was said: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute as unconstitutional?"

In *Daniels v. Tearney*, 102 U. S. 415, it was also said that "it is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. . . . The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of



repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on."

"A party is, as a general rule, not estopped to deny the constitutionality of the statute which assumes to confer authority to order improvements and direct assessments by a mere failure to actively oppose improvements which he knows are being made. This is obviously the correct rule, for without a valid statute there can be no jurisdiction, and parties are incapable of conferring jurisdiction of the subject, although they may confer jurisdiction of the person. But when the doctrine is pressed further, there is much difficulty, for the rule as now established by the weight of authority is, that a party who procures, or actively aids in procuring, the enactment of an unconstitutional statute, and accepts benefit under it, cannot question its validity. It would require a very clear and strong case to warrant the application of this rule to street assessments, and yet such a case is conceivable. The fact that such a rule exists proves that the courts will carry the principle of estoppel to great lengths in the interests of justice, and proves, also, that the courts which confine the operation of the principle of estoppel in assessment cases to mere irregularities have gone astray": *Elliott on Roads and Streets*, 422; *State v. Mitchell*, 31 Ohio St. 592; *Burlington v. Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143; *Motz v. Detroit*, 18 Mich. 526.

That "the principles of estoppel apply where the proceedings are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as where they are sought to be impeached upon other grounds," is not an open question: See *Counterman v. Dublin Tp.*, 38 Ohio St. 515; *Tone v. Columbus*, 39 Ohio St. 281, 303; 48 Am. Rep. 438; *State v. Mitchell*, 31 Ohio St. 592.

Under the decision in *Sleeper v. Bullen*, 6 Kan. 300, the special taxes levied for grading were held illegal, and it was further held that the city had no legal right to sell the lots of Sleeper; yet Sleeper was denied an injunction in that case, because he had encouraged the contractors to do the grading. See also *Ritchie v. City of South Topeka*, 38 Kan. 368.

This case is unlike *Barker v. Comm'rs of Wyandotte Co.*, 45 Kan. 681, because in that case Barker refused to sign the

petition for the improvement when it was presented to him; and is also unlike the case of *Comm'rs of Wyandotte Co. v. Barker*, 45 Kan. 699, because in that case it was sought to estop Barker by mere silence and inaction. Here, Stewart instituted the proceedings which led to the improvement and the assessment complained of. He was a willing and active consenting party in the whole matter. Whether, therefore, the tax be legally valid or not, there is no good ground upon his part for claiming the interposition of a court of equity by its extraordinary process of injunction to stay the collection of the tax against his property: *Tone v. Columbus*, 39 Ohio St. 281, 308; 48 Am. Rep. 438, and cases there cited; *Cooley on Taxation*, 573.

It is claimed, however, that this is a statutory action, having been brought under section 253 of the Civil Code, and therefore that it is not a suit in equity. Ohio has a statute somewhat similar. It was said in *Steese v. Oviatt*, 24 Ohio St. 248, that "the act of May 1, 1856 (*Swan & Critchfield's Rev. Stats.* 1151), gives to the courts jurisdiction to restrain the collection of taxes illegally assessed; but the jurisdiction thus conferred is an equitable jurisdiction, and is to be exercised upon equitable principles. Proceeding under the statute, the party complaining is not required to show a case of threatened irreparable injury, or the absence of a remedy by ordinary legal proceedings, but he must exhibit a case in which, upon the merits, he is entitled to the equitable relief demanded."

This case was followed in *Stephan v. Daniels*, 27 Ohio St. 527. It is there stated "that this is a statute creating new statutory rights of action not theretofore existing is, in the opinion of a majority of the court, quite clear. . . . The tax-payer, stripped of any valuable or practical remedy for the injuries inflicted under color of law and by authority of the state, was almost powerless. To provide a proper remedy was the object of this law. It was a legislative recognition of a fundamental duty enjoined by the constitution of the state, that, while the power to tax was essential to government, the duty of protecting the citizen from illegal exactions under the name of taxes, and under the forms of law, was not to be forgotten or neglected. It being, therefore, remedial in its character, it should receive that construction, if the words will reasonably admit, that will effect the manifest intention of the legislature, and remedy the evil. It gives a remedy by injunction on the application of a single

person taxed, when none existed before. In his application he need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done, for which he has no adequate remedy at law, but only that the tax is illegal which is about to be assessed or collected: *Steese v. Oviatt*, 24 Ohio St. 253. It thus becomes apparent that a new equitable remedy was given by this statute."

In *Tone v. Columbus*, 39 Ohio St. 281, 308, 48 Am. Rep. 438, it was said: "Under section 24 of the act, the city council had no right to authorize the improvement until such two thirds of the owners had petitioned the council for the privileges of the act. We have no doubt that this requirement of the law may be waived by the owners, or that they may by their acts, and under circumstances by their inaction, estop themselves from alleging its failure."

See also *City of Ottawa v. Barney*, 10 Kan. 270. In that case, Mr. Justice Brewer said: "It alleges that the assessment actually made upon one lot was \$184.80, while a legal assessment would not have exceeded \$50, and that a similar proposition existed as to the other lots. It nowhere alleges payment or tender of the amount due under such legal assessment. He who seeks equity must do equity. The plaintiffs below admit they owe something, but deny that they owe all that has been assessed. Before injunction will lie under these circumstances, they must pay or tender what they owe."

The cases of *City of Ottawa v. Barney*, 10 Kan. 270, and *City of Lawrence v. Killam*, 11 Kan. 499, were decided by this court after section 253 of the Civil Code had been adopted. We must therefore conclude that although section 253 of the Civil Code gives an enlarged or additional remedy to the tax-payer, yet if the tax or assessment is illegal, and it is shown that the principles of estoppel apply against the tax-payer, the jurisdiction of the court under the statute is to be exercised upon equitable principles, and the tax-payer, to succeed, must exhibit a case "in which, upon the merits, he is entitled to the equitable relief demanded": *Steese v. Oviatt*, 24 Ohio St. 248.

We now decide, upon the facts found, that the motion for a rehearing be granted, that the judgment of reversal heretofore entered be set aside, and that the judgment of the district court must be affirmed.

**INJUNCTION — ILLEGAL TAXATION.** — Injunctions against the collection of assessments to pay street improvements have frequently been denied where the owner of the property benefited requested the work to be done, encouraged it, or even, having notice of it, made no objection at the time: Note to *Holland v. Mayor etc. of Baltimore*, 69 Am. Dec. 204.

**MUNICIPAL CORPORATIONS. — WHO IS ESTOPPED TO OBJECT TO ASSESSMENTS FOR LOCAL IMPROVEMENTS:** See *Cross v. Kansas City*, 90 Mo. 13; 50 Am. Rep. 1, and note; *Bidwell v. Pittsburgh*, 85 Pa. St. 412; 27 Am. Rep. 662, and note.

**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MAINE.**

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**MOORE v. McKENNEY.**

[88 MAINE, 56.]

**NEGOTIABLE INSTRUMENTS.** — ONE WHO INDORSES IN BLANK A PROMISSORY NOTE of which he is not the payee thereby authorizes the payee to write over such indorsement a guaranty of the payment of such note.

**CONSIDERATION.** — PROMISE TO FORBEAR SUIT, AND TO GIVE FURTHER TIME FOR THE PAYMENT OF A NOTE, though the time to be given is not made definite, is a sufficient consideration for the guaranty of such note by a third person, if it is followed by an actual forbearance for a reasonable time.

**PROMISE TO FORBEAR TO SUE,** NO PARTICULAR TIME BEING NAMED, implies that the forbearance shall be for a reasonable time.

**JURY TRIAL.** — THE COURT MAY INSTRUCT THE JURY TO RETURN A VERDICT FOR EITHER PARTY, when it is plain that a contrary verdict cannot be allowed to stand.

ON August 12, 1880, Isaac A. and Charles E. Johnson made their promissory note in favor of Ann J. Moore, payable on demand. In January, 1885, the defendant, McKenney, indorsed such note in consideration that the payee would forbear to sue thereon, and she did not bring any action to enforce payment of such note until January, 1889.

*Savage and Oakes*, for the defendant.

*McGillicuddy and McCann*, for the plaintiff.

WALTON, J. This is an action on a negotiable promissory note, on the back of which the defendant, not being the payee, had written his name in blank, and over which the plaintiff's counsel, at or before the trial, wrote the words "For value

received, I hereby guarantee the payment of the money above mentioned to Ann J. Moore."

No evidence being offered in defense, the only question is, whether the plaintiff's evidence was sufficient to entitle her to a verdict.

We think it was. The note itself was sufficient to establish a *prima facie* case: *Colburn v. Averill*, 30 Me. 310; 50 Am. Dec. 630; *Lowell v. Gage*, 38 Me. 85; *Childs v. Wyman*, 44 Me. 433; 69 Am. Dec. 111. And the oral evidence offered by the plaintiff in no way weakened her case. It merely substituted fact for presumption. It proved what the actual transaction was, instead of leaving it to be inferred. The evidence showed that the defendant wrote his name on the back of the note declared on, intending thereby to guarantee its payment; that he did this in consideration of the plaintiff's promise to forbear and give further time for the payment of the note; and that the plaintiff, in consideration of the defendant's guaranty, did forbear and give further time, and as much time as could reasonably be required of her. True, the evidence failed to show that a definite time was agreed upon. But this was not necessary.

A promise to forbear and give further time for the payment of a debt, although no certain or definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing its payment: *King v. Upton*, 4 Me. 387; 16 Am. Dec. 266; *Elton v. Johnson*, 16 Conn. 253; 41 Am. Dec. 141; *Howe v. Taggart*, 133 Mass. 284, and authorities there cited.

And in *Lambert v. Clewley*, 80 Me. 480 (a case cited and relied upon by the defendant's counsel), the court did not hold otherwise. Nothing was decided in that case except that the alleged contract to forbear was not proved. The court did not decide that such a contract, if proved, would not be valid unless a definite time of forbearance was agreed upon. In *Smith v. Bibber*, 82 Me. 34, 17 Am. St. Rep. 464 (also cited and relied upon by the defendant's counsel), the head-note does so state; but the opinion of the court does not justify the statement. The word "definite" was inadvertently inserted in the rescript announcing the decision of the court, and this rescript was adopted by the reporter for his head-note. But the error is corrected in the *errata*, at the end of the volume, by stating that the word "definite," in the head-note, should be erased.

It is undoubtedly true, as stated in the opinion of the court in the case last cited, that to constitute a legal contract to forbear, there must be a valid promise to do so, so that for some time the creditor will have no right to sue. But this result may be secured without the naming of any particular time. If the promise is in general terms, no particular time being named, the law implies that the forbearance shall be for a reasonable time. Such is the legal construction of such a promise. The authorities already cited so state. The debtor, therefore, by such a promise, does obtain a right, not only to some delay, but to a reasonable delay, such as, under all the circumstances, he is reasonably entitled to. We therefore repeat that a promise to forbear, although for an indefinite time, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing the payment of a debt.

The uncontradicted evidence in this case clearly entitled the plaintiff to a verdict in her favor; and it is the opinion of the court that the jury were properly instructed to return such a verdict. Prevention is better than cure. And the court may properly instruct the jury to return a verdict for either party, when it is plain that a contrary verdict cannot be allowed to stand: *Jewell v. Gagné*, 82 Me. 480, and cases there cited.

It is very clear that, upon the evidence reported, a verdict against the plaintiff could not be sustained. It was therefore the right of the plaintiff to have the jury instructed not to return such a verdict.

Exceptions overruled.

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**NEGOTIABLE INSTRUMENTS — EFFECT OF AN INDORSEMENT IN BLANK BY ONE WHO IS NEITHER THE PAYEE NOR THE HOLDER.** — The indorsement by a third party in blank gives to the payee or the indorsee the implied power to write above it the most absolute terms of guaranty: *Killian v. Ashley*, 24 Ark. 511; 91 Am. Dec. 519. To the same effect, see *Camden v. McKoy*, 3 Scam. 437; 38 Am. Dec. 91, and note; *Whiton v. Mears*, 11 Met. 563; 45 Am. Dec. 233; *Spiller v. James*, 32 Ind. 202; 2 Am. Rep. 334, and note 340, 341.

But in *Schäfer v. Farmers' etc. Bank*, 59 Pa. St. 144, 98 Am. Dec. 323, it is held that the indorsement of a note by one not a party at the time it was made does not authorize the holder or an indorsee to write a guaranty over his indorsement. Compare *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99.

**CONTRACTS — CONSIDERATION — FORBEARANCE TO SUE.** — Forbearance to sue may constitute a valid consideration: *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464, and note; *Chaddock v. Vanness*, 35 N. J. L. 517; 10 Am. Rep. 256; note to *Prater v. Miller*, 60 Am. Dec. 524-527. This applies to

contracts of guaranty: *Thomas v. Craft*, 2 Rich. 113; 44 Am. Dec. 379; *King v. Upton*, 4 Greenl. 397; 16 Am. Dec. 266.

**FORBEARANCE TO SUE, MEANING OF THE TERM.** — A promise to forbear, in general, without adding any particular time, must be understood to mean a total forbearance: *Clark v. Russel*, 3 Watts, 213; 27 Am. Dec. 343.

## WHITEHOUSE v. CUMMINGS.

[88 MAINE, 91.]

**RIGHT OF WAY OF NECESSITY IS UPHOLD ON THE PRINCIPLE** that the grant of a thing is presumed to include, as an incident, whatever right the grantee had in connection with it, and could convey by apt words, without which the thing granted would prove practically useless to the grantee.

**RIGHT OF WAY OF NECESSITY.** — The fact that access to land may be had by passing over the lands of a third person will not defeat a grantee's claim to a way by necessity over the lands retained by his grantor, if there is no right to pass over the lands of such third person.

**ACTION** on the case for obstructing plaintiff's right of way. Leander Yeaton, formerly the owner of a lot of land lying east of the Winthrop road, sold a part of it to one Kimball, in 1870, who conveyed it to William Gage, in 1881, which is shown by the annexed plan, and called the Gage lot. On February 21, 1877, Yeaton sold to plaintiff, Whitehouse, another tract, shown by the annexed map, and there called the Whitehouse lot. In April, 1878, Yeaton sold the remaining portion of his land, which is designated on the annexed plan, and there called the Cummings lot. The boundaries of the entire original tract of land, and the names of the proprietors of adjacent lands, and the location of the Winthrop road, the way, and the school-house, are all apparent from the plan on the opposite page. It did not appear that Yeaton ever owned the school-house lot, or had ever claimed to cross it as a matter of right; but he and his predecessors and successors in title had for more than twenty years, as a matter of fact, crossed the school-house lot at pleasure, in making use of the way to and from the Whitehouse lot to the road, as shown by the plan. Verdict and judgment for plaintiff.

*S. and L. Titcomb*, for the defendant.

*Baker, Baker, and Cornish*, for the plaintiff.

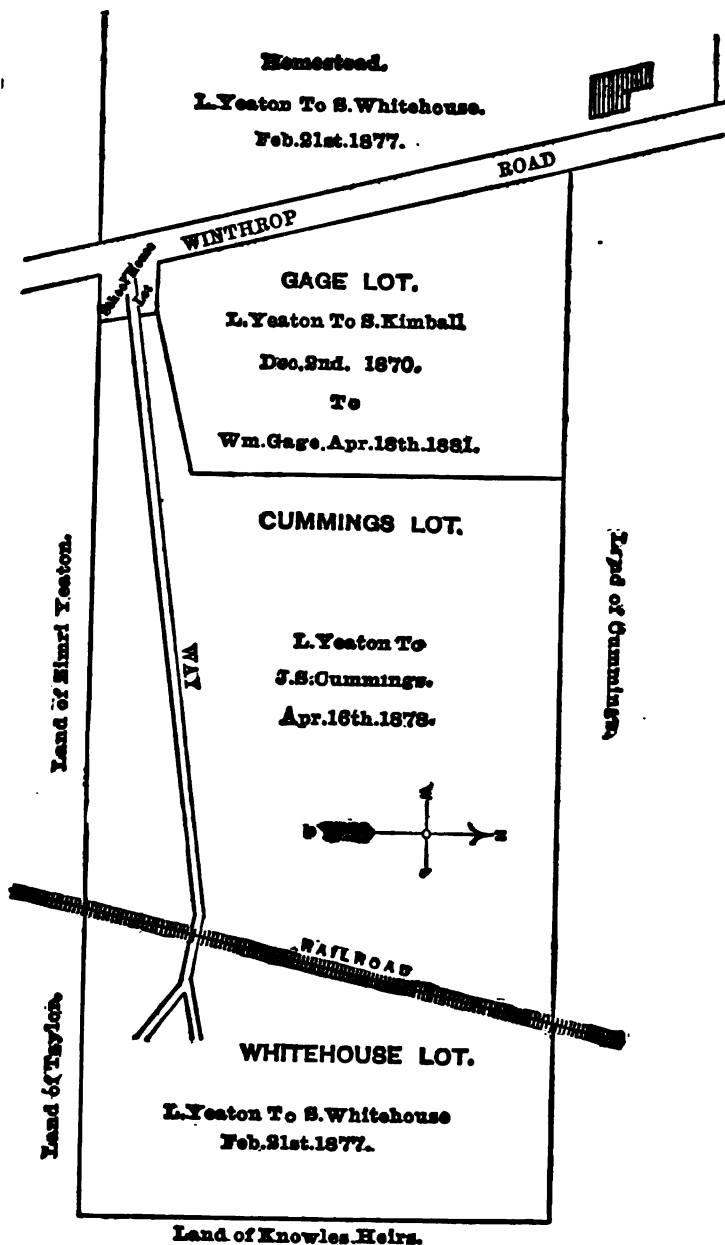
**VIRGIN, J.** This is an action on the case for obstructing the plaintiff's alleged right of way of necessity across the defendant's land and a school-district lot to a highway.



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The defendant contends, contrary to the instruction to the jury, that the plaintiff was not entitled to a right of way of necessity over his grantor's remaining land, for the reason that, when his parcel was conveyed to him, it was bounded in part by the land of strangers, and not wholly by that of his grantor. We are of opinion, however, that his contention is contrary to principle and the overwhelming current of authority.

Such a right of way of necessity as the law recognizes and upholds is found among the numerous applications and illustrations of the old, thoroughly established general principle that the grant of a thing is presumed to include and carry with it, as an incident of the grant, whatever right the grantor had in connection with it, and could convey by apt words without which the thing granted would prove practically useless to the grantee. It results from a grant or reservation implied from the existing circumstances in which the grantee—or, in case of a reservation, the grantor—is thereby placed. When a land-owner conveys a portion of his lot, the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor. This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant indicative of the intention of the parties: *Pomfret v. Ricroft*, 1 Wms. Saund. 323 a, note 6; *Clark v. Cogge*, Cro. Jac. 170; *Warren v. Blake*, 54 Me. 276, 286; 89 Am. Dec. 748; *Trask v. Patterson*, 29 Me. 499.

Every right of way of necessity being founded on a presumed grant, none can be presumed over a stranger's land, and hence none can be thus acquired: *Bullard v. Harrison*, 4 Maule & S. 387; *Howton v. Frearson*, 8 Term Rep. 50; *Pernam v. Wead*, 2 Mass. 203; 3 Am. Dec. 48; *Allen v. Kincaid*, 11 Me. 155; *Collins v. Prentice*, 15 Conn. 89; 38 Am. Dec. 61; *Seeley v. Bishop*, 19 Conn. 128; *Myers v. Dunn*, 49 Conn. 71; *Holmes v. Seely*, 19 Wend. 507; *Smyles v. Hastings*, 22 N. Y. 217; *Nichols v. Luce*, 24 Pick. 102; 35 Am. Dec. 302; *Pettin-gill v. Porter*, 8 Allen, 1; 85 Am. Dec. 671; *Schmidt v. Quinn*, 136 Mass. 575; *Oliver v. Hook*, 47 Md. 301; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489, 505; *Pingree v. McDuffie*, 56 N. H. 306; *Cooper v. Maupin*, 6 Mo. 624; 35 Am. Dec. 456; *Mead v. A-*

*derson*, 40 Kan. 203. When, therefore, property in land has been severed by voluntary or statutory conveyance, one portion of which is inaccessible except by passing over the other, or by trespassing on the lands of a stranger, a grant of a right of way of necessity is presumed between the parties: *Godard on Easements*, Bennett's ed., 268; *Washburn on Easements*, 8d ed., 233, and cases *supra*. Any language in the opinion in *Trask v. Patterson*, 29 Me. 499, which seems to militate with this doctrine cannot be sustained.

But the way must be, from the circumstances, one of strict necessity, and not one of mere convenience: *Dolliff v. Boston etc. R. R. Co.*, 68 Me. 173; *Stevens v. Orr*, 69 Me. 323; *Stillwell v. Foster*, 80 Me. 383; *Allen v. Kincaid*, 11 Me. 155. And as it results solely in consequence of necessity, it ceases or varies with the necessity: *Holmes v. Goring*, 2 Bing. 76; *Rumill v. Robbins*, 77 Me. 193; *Seeley v. Bishop*, 19 Conn. 128; *Viall v. Carpenter*, 14 Gray, 126; *Abbott v. Stewartstown*, 47 N. H. 230

Applying these principles to the facts, it is seen that when Yeaton, owning the entire lot, conveyed the front parcel, in 1870, to Kimball, he would have had no means of access from his homestead and the highway to the remainder of his lot, — presumably pasture and woodland, — provided the parcel conveyed extended across the entire width of the lot, unless the right to cross this parcel had been expressly or impliedly reserved, or unless he could pass over the land of the bounding strangers, — which latter alternative he could not claim without permission.

But the front parcel did not extend across the entire width of the lot. On the contrary, a narrow strip of land, extending along the south side of it to the school-house lot, was not included in the conveyance. This fact strongly indicates that this strip of land was intentionally excepted from the conveyance of Yeaton to Kimball, as for a way for the benefit of the remainder of the lot, so as not to burden the front parcel with a right of way across its entire length at any rate, — provided permission could be obtained to continue it across the two-rod school-house lot. Moreover, that such was their actual and well-understood intention, and concurred in by the school district, seems to be made certain by the contemporaneous and long-continued and unobstructed acts of all concerned; for the use of this way — the only one in existence or use — had been so constant and of so many years' duration, including eight

years of the defendant's occupation, without any objection from any source until the defendant's acts complained of, that it had become a well-defined way on the face of the earth.

2. Whatever might be urged against the soundness of the instruction concerning the school-house lot, had it been made applicable to the lands of all the surrounding owners over which the plaintiff could claim no lawful right without their permission, still, as its application was confined to the school-house lot and the facts in this case, we think the defendant has no just cause of complaint, — especially as there was no way across the defendant's parcel other than the one which had been used so long, and which, from the acts of the owners concerned and the acquiescence of the school district, it may be inferred was agreed upon, and that no other way has been designated by the defendant: *Rumill v. Robbins*, 77 Me. 193; *Schmidt v. Quinn*, 136 Mass. 575. Until the school district interrupts the plaintiff's long-used way over its two-rod lot, or the defendant designates some new way over his land for the plaintiff's use, — neither of which has been done, — we fail to perceive how the defendant can complain of the doctrine contained in the instruction. Moreover, assuming that the lane was intentionally reserved by Yeaton and Kimball as a way to and from the remainder of the lot, and the school district should, at this late day, prevent any further use of its small territory, the plaintiff might, in the absence of any new way better suited to the interest and convenience of the defendant, and designated by him, extend his old one across the southwest corner of the front lot next to the school-house lot.

So much of the first and second requested instructions as is applicable to the facts in the case was given in the charge, and the exceptions to the requested instructions do not seem to be urged by the defendant.

Exceptions overruled.

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PRIVATE WAYS OF NECESSITY. — As to what constitutes a private way of necessity, see *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550, and note. The rule is, that where a grantor conveys lands surrounded by other lands owned by him and lands owned by strangers, the grantee is entitled to a right of way over the lands of the grantor, where he has no other outlet: *Mead v. Anderson*, 40 Kan. 203; *Oswald v. Wolf*, 129 Ill. 200; *Barnard v. Lloyd*, 85 Cal. 131. The enjoyment of a private way of necessity must be limited only by the necessity for its use in connection with the lawful uses of the land to which it is appurtenant: *Whittier v. Winkley*, 62 N. H. 338. Where a private way of necessity, crossing a grantor's lands, extends to a

highway, the fact that such highway is discontinued and re-established farther over upon the grantor's land will not enable the grantees to use the discontinued portion for the purpose of reaching the new highway: *Morse v. Benson*, 151 Mass. 440. A way of necessity cannot be claimed by a grantee who has purchased other adjoining lands over which he has made an outlet better than the one claimed: *Russell v. Napier*, 82 Ga. 771.

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## SMITH v. FRENCH.

[83 MAINE, 108.]

OWNER OF ANIMALS IS NOT LIABLE FOR INJURIES resulting to another from their being carelessly driven on a public highway by one who is neither their owner nor his servant or agent. The liability, if any exists, is against the person driving them, or his master or employer.

*Walton and Walton*, for the plaintiff.

*Merrill and Coffin*, for the defendants.

WALTON, J. It is the opinion of the court that the plaintiff has sued the wrong parties.

If cattle are negligently permitted to stray into the highway, and they run against a traveler and injure him, the owner, or the one having the care and custody of them at the time of the escape, will be liable. But if cattle which are being driven in the highway run against a traveler in consequence of careless and improper driving, the driver will be liable; and if he is not the owner, nor the agent or servant of the owner, an action against the latter cannot be maintained. In such a case, the question is, not who was the owner, but who was the driver.

In this case, the plaintiff was run against by a pair of oxen (yoked together) which were being driven in the highway. The oxen had been trespassing in a neighboring field, and the owner of the field told his hired man to drive them out and drive them home. While so doing, the hired man set a dog on them, and the dog bit one of the oxen, and this frightened them, and caused them to run against the plaintiff's wagon, and the plaintiff was thrown out and injured. Clearly, the cause of the collision was the manner of driving the oxen. And as the driver was neither an owner, nor the agent or servant of the owners, it is the opinion of the court that this action, which is against the owners of the oxen, cannot be maintained. The liability, if any, was with the driver or his employer.

The plaintiff has alleged in his declaration that at the time of the collision the oxen were unlawfully in the highway. But the evidence does not sustain this allegation. They had before that time been unlawfully in the adjoining field. But at the time of the collision they had been driven out of the field, and were in the highway for the purpose of being driven home; and surely it was lawful to use the highway for that purpose. Collisions in the highway have been a fruitful source of litigation; but it is believed that no case can be found in which it has been held that the negligence of a driver is imputable to the owner, unless the former was the servant of the latter: See last edition (1888) of Shearman and Redfield on Negligence, secs. 144-147, and the numerous cases cited in the notes.

Exceptions overruled; nonsuit confirmed.

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**ANIMALS — LIABILITY OF OWNER TO PERSONS INJURED BY.** — The general rule is, that the owners of domestic animals are responsible for mischief done by them when they are allowed to be in a place where it is unlawful for them to be: *Shipley v. Colclough*, 81 Mich. 624; 21 Am. St. Rep. 546, and note.

**IN THE CASE OF** *Stieber v. Amunson*, 78 Wis. 679, it is decided that one who is being driven in a sleigh, and by his own conduct in whooping and yelling so frightens the horses that they run away and injure another person lawfully riding on the highway, is responsible for such injury. The driver is not liable, in the absence of negligence on his part.

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## BLAKE v. SAWYER.

[88 MAINE, 129.]

**PAYMENTS, APPLICATION OF.** — A creditor may apply a payment to any debt which he may choose, where the debtor has not directed such application, and this rule continues though the debt has been barred by the statute of limitations.

**STATUTE OF LIMITATIONS — EFFECT OF APPLICATION OF PAYMENT BY CREDITOR.** — A creditor may apply a payment to any debt not already barred by the statute of limitations, and thereby prolong the running of such statute for six years from the time when the payment is made; but if the statute has already fully run before the payment is made, the creditor, while he may apply it to the barred debt without the direction of the debtor, cannot, by so doing, remove the bar of the statute as to the residue of the debt.

*J. O. Bradbury*, for the plaintiff.

*Merrill and Coffin*, for the defendant.

**WALTON, J.** The right of a debtor to determine to which of several debts a payment made by him shall be applied is

unquestionable. But if he omits to exercise the right, the law allows the creditor to make the appropriation, and the latter may apply it to a debt already barred by the statute of limitations; but such an application of it will not remove the statutory bar with respect to the balance of the debt. To have that effect, the appropriation must be made by the debtor himself.

But the creditor may apply the payment to any debt not already barred by the statute of limitations, and thereby prolong the running of the statute for six years from the time when the payment is made.

Apparently, this distinction between a debt already barred and one not already barred was overlooked by the presiding judge in the trial of this cause, for the indorsement in question was made on the note declared on long before it would have become barred by the statute of limitations; and yet the presiding judge instructed the jury that, to take the case out of the operation of the statute, the plaintiff must show that the party making the payment made it and applied it, or made it to be applied, upon the particular contract in suit. This would have been correct if the indorsement had been made upon a note then barred by the statute. But the instruction, being given with reference to a payment made before the note on which it was indorsed had become barred, was clearly erroneous.

This distinction between debts barred by the statute at the time when the payment is made, and those not then barred, is recognized in *Pond v. Williams*, 1 Gray, 630, and expressly sanctioned in *Ramsay v. Warner*, 97 Mass. 8. And the law is so stated in *Buswell on Limitations*, sec. 81.

Exceptions sustained.

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**PAYMENTS, APPLICATION OF.** — Where the debtor does not direct the application of a payment, the creditor may apply it to any debt which he may choose: *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59, and note; *Orleans County National Bank v. Moore*, 112 N. Y. 543; 8 Am. St. Rep. 775, and note; *Northern etc. Bank v. Lewis*, 78 Wis. 475; *Vansickle v. Ferguson*, 122 Ind. 450.

**STATUTE OF LIMITATIONS — EFFECT OF APPLICATION OF PAYMENT UPON.** — Where there are several distinct claims for services, a payment appropriated upon each of them will interrupt the running of the statute of limitations: *Bartel v. Mathias*, 19 Or. 482; *Lawrence v. Harrington*, 122 N. Y. 408.

## BAKER v. CARTER.

(83 MAINE, 122.)

**HUSBAND AND WIFE** — During cohabitation, a wife has ordinarily a *prima facie* agency to purchase on her husband's credit such supplies as are necessary for herself and the family, and suitable to their situation and condition in life.

**HUSBAND IS LIABLE FOR GOODS FURNISHED AND DELIVERED TO HIS WIFE** and consumed in his family, though they are charged to her when ordered.

*F. E. Southard*, for the plaintiff.

*E. W. Whitehouse*, for the defendant.

FOSTER, J. During cohabitation, a wife has ordinarily a *prima facie* agency to purchase on her husband's credit such supplies as are necessary for herself and family. This rule of law is based largely on the fact that it is customary to intrust a wife with the management of the household. While living together, the law presumes the husband's assent to contracts made by the wife for necessities. This agency, however, is limited to articles that are reasonably necessary for her or the family, and does not extend to business contracts, nor to purchases beyond what may be regarded as suitable to their situation and condition in life.

In *Furlong v. Hysom*, 35 Me. 332, it was held that the husband was liable for articles furnished and delivered to a married woman residing with her husband, necessary and proper for her, though charged to herself, and that the jury were authorized to infer an authority to the wife from the husband to purchase the goods on his credit.

True, the agency of the wife to purchase necessities is only presumptive, and may be disproved by the husband by showing that he had abundantly supplied the house with all things necessary and suitable, or that he had furnished the wife with ample ready money for the purpose, and requested her not to purchase on credit, or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere; though the mere fact that he privately forbade her to act for him will not relieve him from liability, where it appears that he has recognized her agency, or has in some way allowed her to appear to have charge of his house. The husband, in the view of the law, is the head of the house, and has a right to control the affairs of his own household. Nevertheless, while he has a right to say when and how his house



shall be supplied, he cannot repudiate his obligation altogether.

In the present case, he had made no such provision as would relieve him from liability for the acts of the wife in making the purchases. The jury might very properly infer such agency. The case falls within that of *Furlong v. Hysom*, 35 Me. 332.

Motion overruled; judgment on the verdict.

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**HUSBAND AND WIFE — LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED TO WIFE DURING COHABITATION.** — The husband is legally bound for necessities supplied to the wife, so long as she does not violate her duty as a wife: *Morrison v. Holt*, 42 N. H. 478; 80 Am. Dec. 129, and note; note to *Cunningham v. Irwin*, 10 Am. Dec. 462-465.

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## JACKSON v. ESTEN.

[88 MAINE, 162.]

**AMENDMENTS ARE ALLOWED OR DISALLOWED** as may best tend to the furtherance of justice.

**AMENDMENTS OF THE RECORD OF AN EXTENT OF LANDS UNDER EXECUTION** are permitted, irrespective of the lapse of time, if in conformity to the facts, and not prejudicial to the rights of third persons acquired *bona fide* and without notice, but are denied if strangers have in good faith for a valuable consideration become vested with the title, because their equity is equal to that of the creditor.

**AMENDMENT OF AN OFFICER'S RETURN OF A LEVY** after it has been recorded will not be permitted if the rights of intervening *bona fide* purchasers are thereby impaired.

**AMENDMENT OF AN OFFICER'S RETURN OF A LEVY WILL BE ALLOWED AS AGAINST A GRANTEE** whose deed was made for the purpose of delaying and defrauding creditors.

*J. E. Moore*, for the plaintiff.

*J. O. Robinson and J. F. Libby*, for the defendants.

**WHITEHOUSE, J.** Writ of entry to recover two thousand one hundred and ninety-three two thousand two hundred and sixty-five thousandths parts of a piece of real estate known as the Owl's Head Stand, in South Thomaston. Both parties claim to derive title from Elisha Brown. The demandant seeks to establish his title by virtue of the following deeds, duly recorded, viz.: Quitclaim deed from Elisha Brown to Isaac Tolman, 3d, dated October 12, 1855, consideration ten thousand dollars; quitclaim deed from Tolman to Joseph Jackson, dated December 10, 1858, consideration six hundred

dollars; warranty deed of one fifth of premises from Joseph Jackson to Mary C. Carver, November 14, 1872, and deed of same from Mary C. Carver to the demandant, August 13, 1873; quitclaim deed of the entire premises from Joseph Jackson to the demandant, September 4, 1875, consideration one hundred dollars; also deed of same premises from Joseph Williamson, assignee in bankruptcy of Joseph Jackson, to George E. Wallace, September 4, 1875, consideration ten dollars; and deed from Wallace to the demandant, September 6, 1875, consideration ten dollars.

The tenants claim under a warranty deed from Jeremiah Sleeper, who holds conveyances from seven different levying creditors of Elisha Brown.

The validity of these seven levies was brought directly in question in the case of *Morse v. Sleeper*, 58 Me. 329. That of Sidelinger only, on seventy-two two thousand two hundred and sixty-fifths of the property, was found to be valid. With respect to the other, the court say: "Of the seven levies under which the tenant claims title in himself, five were made November 21, 1856, as upon land held by the debtor, Brown, in fee-simple and in severalty, and no reason is assigned in either of them for levying upon an undivided share instead of making the levy upon a portion of the property by metes and bounds. It is essential to the validity of such a levy, under chapter 94, section 13, Revised Statutes of 1841, that it should appear therein that the premises to be levied on could not be divided without damage to the whole: *Mansfield v. Jack*, 24 Me. 98. The omission must be held fatal to these five levies."

But the levy in favor of Hammond, against Brown and others, was held defective because it did not appear with certainty that the debtor whose estate was taken selected one of the appraisers, or was notified to choose one, and neglected.

The question of the validity of these levies having thus been once tried and determined by a court of competent jurisdiction, the judgment is conclusive between the parties and their privies: *Sibley v. Rider*, 54 Me. 463.

Thereupon the officer who made the levies files a petition in this court, asking for leave to amend his returns on the executions by inserting, in that of the last-named levy, the statement that one of the appraisers was in fact chosen by Elisha Brown, whose estate was taken, and by reciting in the other returns, the following, viz.: "And being of opinion that the said real estate cannot be divided without damage to the

whole, and the same being more than sufficient to satisfy this execution"; averring the amendments to be in accordance with the truth.

It will be seen that the deed from Elisha Brown to Isaac Tolman, 3d, in which the demandant's title originates, bears date prior to any of the attachments which ripened into these different levies. But the defendants contend that the conveyance to Tolman was unquestionably made to hinder, delay, and defraud the creditors of Brown; and that the demandant himself is not an innocent purchaser for value, and stands in no better condition than Brown's fraudulent grantee. And they offer evidence in support of this contention.

The questions now presented for the determination of the court are, therefore, the justice and propriety of allowing the defective levies to be amended as proposed, and the admissibility and effect of the evidence offered by the tenants.

The broad principle regulating amendments of the character above described is familiar and easily stated. It is commonly said that they are to be allowed or disallowed "as may best tend to the furtherance of justice": *Johnson v. Day*, 17 Pick. 106; *Hobart v. Bennett*, 77 Me. 401; *Hayford v. Everett*, 68 Me. 505. But this does not purport to be a statement of a definite rule, which may serve as a practical guide in particular cases, but only the declaration of an evident truth comprising other subordinate truths. It is an obviously sound general principle, from which more specific rules may be derived. The practice illustrated by the authorities seems to permit such amendments, irrespective of the time which has elapsed, provided the amendment is clearly in conformity with the facts and does not prejudice the rights of third persons acquired *bona fide* without notice. But where the record of the extent does not show that it was valid, and strangers have in good faith, for a valuable consideration, become vested with the title, their equity is equal to that of the creditor. And unless the equities of the applicant are superior to those of the contestant, the court will refuse to interpose to make that valid which was before invalid: *Freeman on Executions*, secs. 360, 388, and authorities cited. An officer's return of a levy cannot be amended according to the facts after having been recorded, if the rights of intervening *bona fide* purchasers are thereby impaired: *Boynton v. Grant*, 52 Me. 220; *Lumbert v. Hill*, 41 Me. 482. No amendment of an officer's return should be permitted, when such amendment

would destroy or lessen the rights of third persons acquired *bona fide* and without notice, by the record or otherwise: *Fairfield v. Paine*, 23 Me. 493; 41 Am. Dec. 357.

It is true that the doctrine laid down in *Whittier v. Varney*, 10 N. H. 291, has been frequently invoked, in this and other states, as authority for permitting certain amendments to the record of levies, even as against *bona fide* purchasers for value: *Peaks v. Gifford*, 78 Me. 362, and cases cited. The rule in *Whittier v. Varney*, 10 N. H. 291, is thus stated: "The subsequent purchaser or creditor being chargeable with constructive notice of what is contained in the record, if he has there sufficient to show him that all the requisitions of the statute have probably been complied with, and he will, notwithstanding, attempt to procure a title, under the debtor, he should stand chargeable with notice of all facts the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court. And in such cases, amendments should be allowed, notwithstanding the intervening interests of such purchaser or creditor. . . . But if there is an entire omission of anything in the return to indicate that some particular requisition of the statute has been complied with, and there is thus nothing to amend by,—as, for instance, if there is nothing tending to show that the appraisers had been sworn, or that the debtor had notice where he was entitled to it,—subsequent purchasers or creditors have good right to regard such omission as evidence of a fatal defect."

It is important to observe, however, that in this case the jury had found for the plaintiff on an issue of fraudulent collusion between the defendant and his father. It will be found, too, that all the cases in this state in which an amendment has been allowed against an intervening purchaser for a valuable consideration without notice are readily distinguishable from the case at bar, either in respect to the character of the omission and the nature of the amendment, or other material points affecting the equities of the parties.

But all the authorities agree that the amendments here proposed are properly allowable against the execution debtor himself, and all those deriving title from him and standing in no better condition in equity. In *Glidden v. Philbrick*, 56 Me. 222, the court say: "If the conveyance under which the demandant derives his title is fraudulent and void as to creditors, the grantee cannot expect that the law will protect his claim.

He can be in no better condition than his fraudulent grantor. An amendment which would be allowable against his grantor should be equally permitted as against him. The deed under which the demandant claims title is long prior in time to the levy of the tenant. Being prior in time, if *bona fide*, it must prevail, whether the levy is good or bad. An amendment, in such case, could have no effect. If the deed was fraudulent, the creditors of the fraudulent grantor should be permitted to impeach it. The amendment, therefore, should be allowed as against the judgment debtor and against his fraudulent grantee. Such grantee, and all deriving their title from him with notice of the fraudulent conveyance, should stand in no better condition than the judgment debtor through whom they claim." See also *Marston v. Marston*, 54 Me. 476; *Wellington v. Fuller*, 38 Me. 61. In the last-named case the court say: "The levy is defective, but as the rights of the creditors are to be preferred to those of Gifford, and of all claiming under him with notice of this defective title, the officer may have leave to amend his return in accordance with the facts."

With respect to the demandant's title, the language of the court in *Mores v. Sleeper*, 58 Me. 329, is equally applicable to the evidence now introduced and offered: "The proof is plenary and uncontradicted," say the court, "that the conveyance from Brown and Tolman, whose title Jackson holds, was made for the express purpose of delaying and defrauding creditors. . . . It may be worthy of remark that the deed from Tolman to Jackson is a mere quitclaim of his (Tolman's) right, title, and interest, made upon a nominal consideration which contrasts strangely with that named in the two deeds from Brown to Tolman, and that there is no evidence that either Tolman or Jackson ever had any possession, under these conveyances, of the Owl's Head Stand, which would seem to have passed from the possession of Brown into that of the levying creditors. Tolman's deed to Jackson does not purport to convey the land, but only the right, title, and interest of the grantor in it, and that (upon the testimony here presented) was the right, title, and interest of a fraudulent grantee. If the tenant held Jackson's title, as well as his own, it would certainly be incumbent on him at least to show a purchase by Jackson in good faith, for value, without notice, when the first link in the chain is invalidated by fraud."

Our conclusion, therefore, is, that the tenants in possession,

representing the levying creditors, and holding under a warranty deed for a valuable consideration, should be permitted to impeach the title of the demandant; and that the evidence reported which is material to that issue, and otherwise admissible under the rules of evidence, would authorize a jury to find that the original conveyance from Brown to Tolman was fraudulent as to the creditors of Brown; that Tolman was cognizant of Brown's fraudulent design; and that Joseph Jackson and the demandant were not *bona fide* purchasers for a valuable consideration without notice of the fraud. If such should be the finding of the jury, the amendments proposed, being satisfactorily shown to be in conformity with the truth, are to be allowed, and regarded as made. Otherwise the amendments are not to be allowed.

According to the stipulations in the report, the entry must be, action to stand for trial.

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**AMENDMENTS.** — Courts always interfere by way of amendment, and do that equity which a party would be entitled to on an application to a court of equity: *King v. State Bank*, 9 Ark. 185; 47 Am. Dec. 739. The court may amend its records and make them conform to the facts, even after the lapse of time: *Frink v. Frink*, 43 N. H. 508; 80 Am. Dec. 189, and note; 82 Am. Dec. 172. Amendments of records which affect the vested rights of third parties, or where injustice will be done to any one, cannot properly be allowed: *Sawyer v. Manchester etc. R. R. Co.*, 62 N. H. 135; 13 Am. St. Rep. 541.

**AMENDMENT OF RETURNS TO WRITS.** — For a discussion of the law relating to the amendment of the returns to writs of execution, see note to *Malons v. Samuel*, 13 Am. Dec. 173-181. Compare also *Hall v. Stevenson*, 19 Or. 153; 20 Am. St. Rep. 803; *Shenandoah etc. R. R. Co. v. Ashby*, 86 Va. 232; 19 Am. St. Rep. 898, and note.

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## INHABITANTS OF PHILLIPS v. INHABITANTS OF MADRID.

[58 MAINE, 205.]

**MARRIAGE AND DIVORCE.** — A PROHIBITION AGAINST REMARRIAGE CONTAINED IN A DECREE OF DIVORCE ENTERED IN ANOTHER STATE is in the nature of a penalty, and has no force as a disability to remarry in this state, though the cause of divorce was such that had it been granted in this state the guilty party would have been prevented by its laws from contracting a second marriage.

*P. A. Sawyer*, for the plaintiffs.

*H. L. Whitcomb*, for the defendants

LIBBEY, J. *Assumpsit*, for pauper supplies furnished by the plaintiff town for the relief of Lorestein Hinkley, Ella R. Hinkley, as his wife, and Barnard C. Hinkley and Harry L. Hinkley, their sons.

By the agreement of the parties, it appears that Lorestein Hinkley had his legal settlement in the defendant town; and the right to recover for what was furnished him is admitted. The right to recover for the supplies furnished Ella R. and the two sons depends upon the legality of the marriage of said Lorestein and Ella R.

By the agreed facts, it appears that said Ella R. was legally married to one Wardwell, of Clinton, in this state, May 25, 1879; that she and her husband afterwards moved to Massachusetts, where they separated, and she returned to this state; that while she was residing here, a libel for divorce was commenced by her husband, in the court of Massachusetts, duly served on her in this state, and that a decree nisi of divorce was granted by the court there, in November, 1882, for the adultery of the wife, which was duly made absolute in November, 1883. Said Ella R. remained in this state, and on the 6th of September, 1884, was duly married to said Hinkley, in said town of Phillips.

It is claimed by the defendants that by the statute of Massachusetts and of this state in 1883 a husband or wife for whose fault a divorce was granted could not marry again within two years from the decree of divorce, and as that time had not elapsed when the paupers were married, in September, 1884, their marriage was illegal, and that Ella R. and her two sons do not take the pauper settlement of said Lorestein.

We think this contention is not sound. When the divorce was granted, Ella R. was no longer the wife of Wardwell: *Burlen v. Shannon*, 115 Mass. 438; *Commonwealth v. Putnam*, 1 Pick. 136. The prohibition to remarry within the time named was in the nature of a penalty. It had no force as a disability to remarry out of the state of Massachusetts. It did not attach to the person of the wife in this state. This rule is held in many courts: *Cox v. Combs*, 8 B. Mon. 231; *People v. Chase*, 28 Hun, 310; *Ponessford v. Johnson*, 2 Blatchf. 51; *Moore v. Hegeman*, 92 N. Y. 521; 44 Am. Rep. 408; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602; 43 Am. Rep. 189; *Vanstorck v. Griffin*,

71 Pa. St. 240; *Commonwealth v. Lane*, 113 Mass. 458; 18 Am. Rep. 509.

Nor does the prohibition upon the guilty party to remarry by the statute of this state attach to said Ella R. Our statute applies only to divorces granted by the courts in this state. It has no reference to a decree granted in another state: *Bullock v. Bullock*, 122 Mass. 3.

We think the marriage of said Lorestein and Ella R. was legal, and that the plaintiffs are entitled to judgment for the full amount claimed.

Defendants defaulted.

**MARRIAGE AND DIVORCE.—EFFECT OF A DECREE OF DIVORCE WITH A PROHIBITION AGAINST REMARRIAGE.**—A party against whom a decree of divorce is rendered, in a state which prohibits the subsequent remarriage of a person against whom such a decree is rendered, may nevertheless contract another marriage in a state where such prohibition does not exist: *Wilson v. Fleck*, 68 Ala. 525; 2 Am. St. Rep. 763, and note.

**PENALTIES—CONFLICT OF LAWS.**—No state will enforce the penalties imposed by the laws of another state: *Attrill v. Huntington*, 70 Md. 191; 14 Am. St. Rep. 344, and note 350-353.

## McPHERTERS v. PAGE

[33 MAINE, 226.]

**TROVER.**—That the defendant acted as an agent or servant of another does not furnish any justification in an action of trover.

**TROVER—CONVERSION, WHAT IS.**—Any distinct act of dominion wrongfully exerted over property in denial of or inconsistent with the owner's right amounts to a conversion. It is not necessary that the wrongdoer apply the property to his own use, if he has exercised dominion over it in exclusion of, or in defiance of, or inconsistent with the owner's right. Hence if officers seize meat without authority, take it to a market, where a butcher, at their request, cuts it into steaks and roasts, and lets one of the officers have paper to do pieces up to distribute round to his friends, such butcher is guilty of conversion, though he neither uses nor sells any of the meat.

*Jasper Hutchings*, for the plaintiffs.

*Barker, Voss, and Barker*, for the defendant.

**FOSTER, J.** Trover; to recover the value of one carcass and two saddles of deer.

It is admitted that the deer were lawfully killed by the plaintiffs, and that they owned the carcass and saddles for which this suit is brought.



The only question involved is, whether there has been a conversion of the property by the defendant.

The carcass and saddles were, during open season, put on board the cars, to be transported to Boston for sale. Upon their arrival at Bangor, they were seized by a constable and two police-officers, for some supposed violation of law on the part of the plaintiffs, in attempting to transport them out of the state. They were taken and carried by these officers to the defendant's meat-market in the city, and there left with him. He knew the officers' possession came by seizure. The officers had no precept, and procured none, either against the property or the plaintiffs. They were not justified in seizing them, or in afterwards doing what they did with them. Nor have we any doubt that the acts of the defendant, with reference to the property in question, amounted to a conversion. The evidence is uncontradicted that he skinned the carcass and saddles, cut them into steaks and roasts, let one of the officers "have paper to do the pieces up to distribute them round to his friends," and sent a few of the orders out with his own team. This he admits. He used none of the meat himself; neither was any of the meat sold.

The defendant sets up no justification by his pleading. It would not avail him were he to do so, with the facts before us. Notwithstanding he may have acted as the agent or servant of the officers in what he did, it furnishes him no legal justification. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also": *Kimball v. Billings*, 55 Me. 147, 151; 92 Am. Dec. 581.

It is established as elementary law, by well-settled principles and a long line of decisions, that any distinct act of dominion wrongfully exerted over property, in denial of the owner's right or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it, in exclusion or in defiance of or inconsistent with the owner's right, that, in law, is a conversion, whether it be for his own or another person's use: *Cooley on Torts*, 448; *Webber v. Davis*, 44 Me. 147, 152; 69 Am. Dec. 87; *Miller v. Baker*, 1 Met. 27; *Fernald v. Chase*, 37 Me. 289. "He who interferes with my goods, and without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does

it at his peril to answer me the value, in trespass or trover": *Gibbs v. Chase*, 10 Mass. 125, 128.

In this case, the defendant was more than a mere naked bailee. He exercised a dominion over the property destructive of it, and inconsistent with the plaintiff's ownership. The fact that he was the servant of others who were themselves wrong-doers, and acted under their authority, cannot avail him, though he may have been ignorant of their want of title to the property in question: *Kimball v. Billings*, 55 Me. 147, 151; 92 Am. Dec. 581; *Coles v. Clark*, 3 Cush. 399, and cases there cited; *Hoffman v. Carow*, 22 Wend. 235; *Gilmore v. Newton*, 9 Allen, 171; 85 Am. Dec. 749; *Freeman v. Underwood*, 66 Me. 229, 233.

The stipulation of parties has settled the amount of damages to be recovered.

Judgment for the plaintiffs for \$43.73, with interest thereon from the date of the writ.

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**TROVER — WHAT CONSTITUTES CONVERSION.** — See note to *Hale v. Ames*, 15 Am. Dec. 151-153; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 161.

**TROVER — DEFENSES.** — That the defendant acted under instructions from another, who himself had no authority, is no defense to an action of trover: *Everett v. Coffin*, 6 Wend. 603; 22 Am. Dec. 551.

## BENNETT v. AMERICAN EXPRESS COMPANY.

[33 MAINE, 236.]

**CARRIERS.** — THE NEGLIGENCE OF A COMMON CARRIER IS ESTABLISHED PRIMA FACIE by proof of the delivery of property to and its acceptance by him for transportation, and its non-delivery to the consignee.

**CARRIERS ARE ANSWERABLE FOR PROPERTY SEIZED AND TAKEN FROM THEIR POSSESSION BY AN OFFICER WITHOUT A WARRANT** or other legal process. As against the owner or consignee of the property, the seizure has no other effect than a like trespass by an unofficial person.

**CARRIERS.** — A STATUTE IMPOSING A PENALTY upon any person killing, destroying, or having in his possession, between the first days of October and January, more than one moose, two caribou, or three deer does not prohibit common carriers from having more than three deer in their possession between said days for the purposes of transportation.

**STATUTES, CONSTRUCTION OF.** — THE MEANING OF THE LEGISLATURE MAY BE EXTENDED beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, and the purpose which was designed.

**INTERSTATE COMMERCE.** — FROM THE MOMENT THAT AN ARTICLE OF COMMERCE COMMENCES TO MOVE FROM ONE STATE TO ANOTHER, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation, and not to the police power of the state.

*F. J. Whiting*, for the plaintiff.

*Barker, Vose, and Barker*, for the defendants.

**FOSTER, J.** It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer which were legally killed under the laws of this state; that the same were closely boxed, in good condition for shipment, and delivered by the plaintiff onto the platform of the Maine Central Railroad Company, at Newport station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car, on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendants' car, without any search-warrant or other legal process, and without objections from the defendant company or their agents, and have never since been delivered, either to the consignees or the express company.

Upon the facts thus stated, the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is therefore upon the defendants to show facts exempting them from liability: *Little v. Boston and Maine R. R. Co.*, 66 Me. 241.

The property of the plaintiff while in the hands of the defendants as common carriers, *in transitu*, was seized by an officer, without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was, therefore, a mere trespasser, and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody: *Edwards v. White Line Transit Co.*, 104 Mass. 163; 6 Am. Rep. 213. As against the plaintiff, the seizure was of no more validity than a trespass of an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery, or accident. He stands in the relation of in-

suror, where, as in this case, no special contract is shown, and, upon grounds of public policy, is liable for all losses resulting from accident, trespass, theft, or any kind of unlawful dispossession of the property intrusted to him to carry, — excepting only such as arise by the act of God or public enemies: *Adams v. Scott*, 104 Mass. 166; *Kiff v. Old Colony and Newport R'y Co.*, 117 Mass. 593; 19 Am. Rep. 429; *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 462; 92 Am. Dec. 606.

In the case of *Edwards v. White Line Transit Co.*, 104 Mass. 163, 6 Am. Rep. 213, it was held that while the carrier was not liable in trover for conversion of the property, he was, nevertheless, liable on his contract or obligation as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," say the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

But the defendants claim exemption from liability in this action on the ground that the property was put into their possession fraudulently; that having had in their possession, and transported during the year, after the first day of October, and before the time when this property was delivered to them, three deer from Newport station, to places beyond the limits of the state, they directed their agents not to receive for transportation any deer or parts thereof, and that this fact was known, by report, to the plaintiff before he delivered the box to the defendants' agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The statute invoked by the defendants (R. S., c. 30, sec. 12) is as follows: "Whoever kills, destroys, or has in possession, between the first days of October and January, more than one moose, two caribou, or three deer forfeits one hundred dollars for every moose, and forty dollars for every caribou or deer killed, destroyed, or in possession in excess of said number; and all such moose, caribou, or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer, or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of law."

The defendants claim that, under this statute, they could

not lawfully take any more deer, or parts thereof, into their possession for transportation before the following January.

But we cannot adopt such a construction of this statute as would make it apply to common carriers. Such construction as claimed by the defendants would make it unlawful for the carrier to transport, between the first days of October and January, the carcasses of moose, caribou, or deer lawfully killed before the first day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate commerce, it is sufficient to say that it was not the intention of the legislature so to apply it. The statute, like many others, may, in general terms, be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction must be such as was evidently intended by the legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration: *Allen v. Young*, 76 Me. 80. In that case it was held that the transportation of the hide or the carcass of a deer, from place to place in this state, is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the statute, in express terms, provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of forty dollars. Certainly, that language is as broad, comprehensive, and imperative as that of the statute invoked in this case; yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in *State v. Beal*, 75 Me. 289: "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed": *United States v. Freeman*, 3 How. 557, 565; *Holmes v. Paris*, 75 Me. 559, and authorities there cited.

The box was delivered to and received by the company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendants, that their agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the company's responsibility by special contract, or

such knowledge brought home to this plaintiff, and assented to by him, as would be necessary to limit such responsibility: *Fillebrown v. Grand Trunk R'y Co.*, 55 Me. 462; 92 Am. Dec. 606. "A common carrier may limit his responsibility for property intrusted to him," says Bigelow, C. J., in *Buckland v. Adams Exp. Co.*, 97 Mass. 125, 93 Am. Dec. 68, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of an owner or consignor of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value, and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff; it was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this state. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this state, but to a point outside of its limits, in another state. It had lawfully commenced to move as an article of commerce from one state to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the state. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States. The transportation of the subject of interstate com-

merce, where it is such as may lawfully be purchased, sold, or exchanged, is, without doubt, a constituent of commerce itself, and is protected by and subject only to the regulation of Congress: *The Daniel Ball*, 10 Wall. 557, 565; *Bowman v. Chicago etc. R'y Co.*, 125 U. S. 465, 485; *County of Mobile v. Kimball*, 102 U. S. 691; *Welton v. Missouri*, 91 U. S. 275; *Coe v. Errol*, 116 U. S. 517; *Leisy v. Hardin*, 135 U. S. 100.

Defendants to be defaulted; damages to be assessed at nisi prius.

CARRIERS—PRESUMPTIVE EVIDENCE OF NEGLIGENCE.—Non-delivery at the point of destination is presumptive evidence of negligence on the part of a carrier of goods: *Wheeler v. Oceanic S. S. Nav. Co.*, 125 N. Y. 155; 21 Am. St. Rep. 729, and note.

CARRIERS—GOODS SEIZED BY AN OFFICER.—Goods in the hands of a common carrier may be seized under process against the owner, and such a seizure releases the carrier from liability for non-delivery: *Simpson v. Du-four*, 126 Ind. 322; 22 Am. St. Rep. 590, and note; *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566. But where the carrier allows an officer to take goods he is carrying, it is no defense, against an action of trover for their value, to show that the officer took them without showing that he had a legal right to take them by virtue of his writ: *Gibbons v. Farnell*, 63 Mich. 344; 6 Am. St. Rep. 301, and note.

STATUTES, CONSTRUCTION OF.—The spirit of a statute, ascertained from the intention of its makers, not the letter, must control in its construction: *Barbour v. Louisville*, 83 Ky. 95; *Riggs v. Pakner*, 115 N. Y. 506; 12 Am. St. Rep. 819, and note.

INTERSTATE COMMERCE—STATUTES.—State statutes attempting to regulate interstate commerce are unconstitutional and void: *Ex parte Rosenblatt*, 19 Nev. 439; 3 Am. St. Rep. 901, and note; *Gulf etc. R'y Co. v. Dwyer*, 75 Tex. 572; 16 Am. St. Rep. 926; *State v. Chicago etc. R'y Co.*, 40 Minn. 267; 12 Am. St. Rep. 730. A statute prohibiting the transportation from one state to another of prairie chickens which have been lawfully killed is void, as in contravention of the provision of the federal constitution granting to Congress the power to regulate the commerce among the several states: *State v. Saunders*, 19 Kan. 127; 27 Am. Rep. 96. But compare *Phelps v. Racey*, 90 N. Y. 10; 19 Am. Rep. 140.

## KILGORE v. RICH.

[88 MAINE, 305.]

**INFANTS—NECESSARIES.**—Expenses of an infant's board while attending school may be regarded as necessities.

**INFANT IS LIABLE** to a person who discharges a liability at the infant's request for necessities furnished to him, but the amount of the liability is not to be measured by the amount paid or the contract price, but is limited to such sum as appears to be a reasonable compensation for the necessities.

*Joseph Williamson*, for the plaintiff.

*William H. Folger*, for the defendant.

PETERS, C. J. The jury found that at the request of the defendant, then an infant, the plaintiff paid for him a board bill which he had previously contracted while attending school. It was ruled at the trial that the expense of an infant's board while attending school might be regarded as necessities. The correctness of this ruling is perhaps unquestioned. At all events, Coke's enumeration of the kinds of necessities has always been accepted as true doctrine, which are these: "Necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise his good teaching, or instruction, whereby he may profit himself afterwards."

It was also ruled at the trial that an infant, being liable to one person for such a bill, could make himself liable to another who should pay such bill for him at his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the cases satisfies us that it is well supported by the authorities.

The infant's liability is in no way enlarged by owing the debt to one, rather than to another. The rule lends no temptation to create a debt, as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. In *Clarke v.*



*Leslie*, 5 Esp. 28, it was held that an infant, who was threatened with arrest upon a process sued out against him on a debt for necessities, would be liable to a person who, at his request, advanced money to release him. In that case there was legal pressure, but in many instances moral pressure would be great. *Swift v. Bennett*, 10 Cush. 436, is a case where an infant bought an outfit for a whaling voyage, drawing for the amount of the bill on the plaintiffs, who accepted the bill, and paid it when it became due. They were allowed to collect of the infant what the goods were reasonably worth to him, in an action for money paid on his account. So in *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746, a person who signed an infant's note given for necessities, as a surety, was allowed, after payment of the note, to recover the amount paid, not upon the note, but as money paid for the benefit of the infant. *Randall v. Sweet*, 1 Denio, 460, is precisely in point with the present case.

The defendant relies on the rule generally prevailing in the cases, that money is not a necessary, though lent to an infant who afterwards purchases necessities with it. "But," says Mr. Bishop, "one who pays money at his (infant's) request to a third person for necessities can recover it": Bishop on Contracts, sec. 914. The difference is between lending or paying. Mr. Wharton (Wharton on Contracts, sec. 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase "specific" necessities stands in the position of the tradesman who furnishes the necessities. In the case at bar, the plaintiff could have taken an assignment of the claim, and been entitled to recover it, and there really is no good reason to defeat his claim as it is here presented.

Exceptions overruled.

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INFANTS—NECESSARIES.—As to what are necessities, and an infant's liability for the same, see note to *Craig v. Van Bebber*, 18 Am. St. Rep. 643-658.

## BREMNER v. INHABITANTS OF NEWCASTLE.

[83 MAINE, 415.]

**NEGLIGENCE — EVIDENCE OF INJURIES TO OTHER PERSONS.** — In an action for injuries resulting from an alleged defect in a highway, where the question at issue is, whether the defect rendered the highway unsafe for travelers, evidence that other persons received injuries from the same defect is not admissible.

*W. H. Hilton*, for the defendants.

*L. M. Staples*, for the plaintiff.

**LIBBEY, J.** This is an action against the defendant town to recover damages alleged to have been received by a defect in a highway in said town. The alleged defect was the position of a plank at the Newcastle end of the bridge across the river between that town and Damariscotta. One issue involved in the case was, whether the plank rendered the way unsafe for travelers.

The plaintiff called one Dexter Sanborn as a witness, who, after describing the position of the plank, was asked by plaintiff's counsel, against the objection of the defendant, this question: "In passing from the Newcastle side onto that bridge, what effect did it have upon your carriage?" The question was admitted, and the witness answered: "Go quick enough, and it would yank you some." He was further asked: "Did n't you break a spring there?" to which he was permitted to answer, under defendant's objection: "I broke a spring going over that plank." He was further asked: "What kind of a carriage was it this spring was broken on?" To this, objection was made, but it was admitted, and the witness answered: "A hack. I was driving the hack."

We think this was error. This court has quite recently held that such evidence in this class of cases is not competent. The practice in this state has been in accordance with this rule: *Branch v. Libbey*, 78 Me. 321; 57 Am. Rep. 810, and cases cited.

The same rule prevails in Massachusetts: See cases cited in *Branch v. Libbey*, 78 Me. 321; 57 Am. Rep. 810; and in New Hampshire: *Hubbard v. Concord*, 35 N. H. 52; 69 Am. Dec. 520.

We are aware that courts in some other jurisdictions hold this class of evidence competent, but we think our rule is wise, and we must adhere to it.

Exceptions sustained.

**NEGLIGENCE—EVIDENCE OF FORMER ACCIDENTS.**—In an action to recover for personal injury received from falling into an opening on the sidewalk, evidence that, prior thereto, other persons had fallen into the same opening is inadmissible: *Mathews v. City of Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and particularly note. Previous negligence on the part of an engineer is not important, unless he is shown to have been negligent at the time of the injury for which the suit is brought: *Thompson v. Lake Shore etc. R'y Co.*, 84 Mich. 281. Evidence of similar accidents at stations is inadmissible in an action against a railroad company, in the absence of evidence to show that the conditions were similar: *Brady v. Manhattan R. R. Co.*, 127 N. Y. 46. It was held error to permit a witness to testify that, two years prior to the accident in question, he fell upon the ice at the same place, and that there was then about the same amount of ice as when plaintiff fell: *Gillrie v. Lockport*, 122 N. Y. 403. In *Kraats v. Brush etc. Co.*, 82 Mich. 457, the admission of evidence of a similar condition of the wires of an electric-light company, some time previous to the accident in question, caused by such condition, was held not to be prejudicial error.

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### MORSE v. MOORE.

[83 MAINE, 473.]

**WARRANTY.—A SALE OF GOODS BY A PARTICULAR DESCRIPTION OF QUALITY** implies a warranty that the goods are or shall be of that description.

**WARRANTY.—ACCEPTANCE OF GOODS, THOUGH THE CONTRACT OF SALE WAS EXECUTORY**, does not prevent the vendee from recovering for a breach of warranty of the quality of such goods.

**EXECUTORY CONTRACTS OF SALE.—ACCEPTANCE OF GOODS WHICH WERE SOLD BY EXECUTORY CONTRACTS** raises a presumption that they correspond with the goods agreed to be delivered, and affords some evidence of a waiver of any defect of quality, if such is shown to exist; but the presumption is not conclusive, and may be rebutted by evidence that the vendee objected at the time, and notified the vendor of the alleged defect, or, though the vendee was silent, that he did not waive his right to insist on the warranty of quality.

**WARRANTY.—FOR A BREACH OF WARRANTY OF QUALITY, WHETHER THE SALE IS EXECUTED OR EXECUTORY, THE VENDEE HAS THREE REMEDIES** against the vendor: 1. The right to reject the goods if the property has not passed to him; 2. A cross-action for damages for the breach; and 3. The right to plead the breach in defense of an action by the vendor, so as to diminish the price.

*C. E. Littlefield*, for the defendant.

*A. N. Williams*, for the plaintiffs.

**PETERS, C. J.** The controversy in this case grows out of an agreement between plaintiffs and defendant, made and delivered in this state, which runs as follows: "This agreement, made and entered into this seventh day of January, 1888, by and between Morse and Sawyer, of Bath, Maine, of

the first part, and Warner Moore, of Richmond, Virginia, of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby sell, and agree to deliver at their wharves at Water Cove (Cape Small Point, opposite Burnt Coat Island, as seen in Coast Chart No. 6, from four to six miles west of Seguin Island light-house), Maine, after the ice has become twelve inches in thickness, of good quality, during the months of January or February, 1888, two thousand tons of good, clear, merchantable ice not less than twelve inches in thickness, to be weighed by a sworn weigher, with all the proper fitting material necessary for the voyage included, at the price or rate of forty cents per ton of two thousand pounds; each cargo to be paid for on presentation of sight draft or note for thirty days or sixty days, as may suit party of second part, for the amount accompanying bill of lading and weigher's certificate of said cargo, cakes to be twenty-two by thirty inches."

The ice delivered under this contract was shipped to Richmond, Virginia, where the defendant resides, to be sold in that market to his customers. It was to be paid for according to its weight and quality at the port of shipment in Maine, any deterioration of the article during transit being at the risk of the purchaser.

The first question submitted to the jury was, whether the ice had been accepted by the defendant or not, and that was decided in favor of the plaintiffs.

That brought up the question, whether, having accepted the ice, the defendant could rely on a breach of the warranty of the quality of the ice to reduce the claim of the plaintiff, who sues in this action of *indebitatus assumpsit* for the contract price, the defendant alleging that the ice was not, at the time and place of delivery in Maine, of the quality called for by the contract.

The judge presiding, being of the impression that such a defense might be admissible in case of an executed agreement containing warranty, but not where the agreement is executory, ruled out the defense as a matter of law. It is to be noticed that the ruling was without qualification, admitting of no inquiry into the circumstances in which the ice was accepted. It determines that an acceptance in a case of this kind (in the absence of fraud, of course) absolutely ter-

minates the obligation of the vendor. The judge further ruled that "when the defendant took [that is, by a hired carrier] the property, and carried it away, the property passed to him."

Our examination of this question leads us to the conclusion that the position of the defendant was well taken, and that the alleged defense should have been permitted to him.

That there is a warranty, or a condition precedent amounting to warranty, in the contract there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty, a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial for present purpose whether it be regarded as an express warranty, or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in the contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally, our own cases included, that a sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description,—a warranty which becomes a part of the contract, if relied upon at the time by the purchaser: *Bryant v. Crosby*, 40 Me. 9; *Randall v. Thornton*, 43 Me. 226; 69 Am. Dec. 56; *Hillman v. Wilcox*, 30 Me. 170; *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455, and cases cited. Here there is a clear description of both the kind and quality of the ice,—the quality to be merchantable.

It was conceded at the trial that the position relied on by the defense would be legitimate were it an executed instead of executory contract that contained the warranty. Why should there be the difference? Certain early New York cases, which will be further considered hereafter, by which the rule given at the trial is more or less supported, give as a reason for the rule that in an executory contract any article of a particular quality may be tendered in the performance of the contract, and the vendee must see if the article agrees with the terms of the contract, while in an executed sale the agreement is, that a particular article, actually delivered, possesses the quality stipulated for. This undoubtedly expresses correctly the distinction between the classes of con-

tract; but it does not impress us that there should be such an essential difference in their effect. The reason is not palpable why the vendee in the one case more than in the other should have to see that he receives only merchantable articles when a delivery is made. It seems inconsistent that the warranty, which is a part of either contract, should terminate at delivery in one contract, and not in the other. Each vendor makes virtually the same warranty, and the two vendors, at the point of delivery, would appear to stand upon common ground. The seller in an executory contract agrees to do what the seller in an executed contract has already done. When he tenders the articles that he has agreed to deliver, such articles become particularized and identified, and he then represents that such particular and identified articles possess the quality stipulated for by his executory agreement. The terms of the contract of sale become the terms of the sale. The condition precedent becomes a warranty. Professor Wharton (*Wharton on Contracts*, sec. 564) expresses the idea in these words: "A substantial, though partial (defective), performance of a condition precedent, followed by acceptance on the other side, transmutes the condition precedent into a representation (implying warranty), not barring a suit on the contract, though leaving ground for a cross-action for damages."

Executory and executed contracts are very much alike in the elements that enter into them. There are executory steps in all executed contracts. A bargain precedes the sale. If there be a warranty, that is usually first a part of the bargain, and afterwards of the sale. So in an executory contract, the warranty is part of the agreement of sale, and at delivery a part of the sale. Many contracts commonly spoken of as executed contracts are really wholly or partially executory. All orders for goods, whether for present or future delivery, are of an executory nature. All sales by sample are such. The author of *Smith's Leading Cases* (8th ed., vol. 1, pt. 1, p. 339) says, in discussing this distinction: "Where the vendor agrees to sell goods of a certain kind, without designating or referring to any specific chattel, the contract is essentially executory, whether it purports to be a present transfer, or a mere undertaking to deliver at a future period, and the right of property does not pass until the merchandise is delivered to or set apart for the purchaser." Every contract is executory,

on the one side or the other, until the party has done what he has agreed to do.

The fact of acceptance, however, as a matter of evidence may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond,—evidence of more or less force, according to the circumstances of the case. If the goods be accepted without objection at the time or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court.

The law of waiver more commonly applies to things that are not essential to a substantial execution of the contract; often such as relate to the time, place, or manner of performance, or that affect merely the taste or fancy, perhaps, and are such departures from literal performance as do not bring loss or injury upon the purchaser: *Baldwin v. Farnsworth*, 10 Me. 414; 25 Am. Dec. 252; *Lamb v. Barnard*, 16 Me. 364.

We think the rule invoked by the defendant a just one. Speaking generally, it is the safer rule for both buyer and seller. The opposite rule imposes on either of them very great responsibility and risk. It might be ruinous to a vendee, who is in urgent need of an article, not to accept it, although even much inferior in quality to the description contained in the contract. Certainly, it should not be considered a hardship to a seller to require of him a compliance with his contract, or damages for his non-compliance.

The present case illustrates the justness of the rule, if the facts are proved as the defendant alleges them. The plain-

tiffs agreed to deliver ice which they warranted should be good, clear, and merchantable. Two cargoes were loaded for shipment to a southern port. Defendant furnished the vessels, though they were probably chartered by the plaintiffs on the defendant's account. There is nothing in the charge of the judge, in the exceptions, or on briefs of counsel, intimating that the defendant ever saw the ice, either by agent or personally, until it arrived in Virginia, or that he was notified to be present or knew of the delivery at the time of it. It would seem to be a rather stringent construction of the contract that the defendant must watch the loading of the cargoes, upon the penalty, if he failed to do so, of having to pay full price for whatever defective ice might be delivered behind his back, after he had taken for his protection, and paying for it in the consideration of the contract, an agreement of warranty in such positive terms. Still, it may be that the plaintiffs could legally refuse to deliver the ice unless the defendant, after notice, should be present to receive it. The cargoes, after reasonable passages, arrived in a very unmerchantable condition. There was no lack of objection or protest from the defendant. He wrote repeatedly and telegraphed the plaintiffs, expressing his disappointment, and asking their advice as to the disposition of the ice. But no satisfactory answer came. What should he do? There was no possibility of reshipment, nor could the ice be preserved in that climate without the protection that his own ice-houses would afford for such purpose. Storage in any ordinary manner could not possibly save the property. He stored the ice, and sold it by enterprising expedients as rapidly as possible. He alleges that it was late spring ice, of poor texture and in proximately worthless condition when shipped from Maine. If that can be shown by witnesses and in court at the home of the plaintiffs, it would seem to be an injustice if the defendant is not permitted to make the defense.

Mr. Benjamin. (Benjamin on Sales, 3d Am. ed., 888), in allusion to the buyer's remedies after receiving possession of the goods, says he has three remedies against the seller for a breach of the warranty of quality: 1. The right to reject the goods if the property in them has not passed to him; 2. A cross-action for damages for the breach; 3. The right to plead the breach in defense to an action by the vendor, so as to diminish the price. These remedies are mentioned without any distinction between kinds of sales. The propositions are



general, without any intimation that the procedure does not apply to warranties in executory sales. In the text, such a distinction is not even noticed. In the notes to the text, however, it is remarked by the American editor that there are New York decisions inconsistent with the rule stated in the text. The first of these remedies, that of rejecting the goods, seems especially applicable to executory and inapplicable to executed sales, because it precedes acceptance, while in executed sales there has been acceptance and the title has passed. It is only in executory contracts and contracts that are merely *prima facie* executed that the title has not passed.

Mr. Benjamin states further that the buyer's remedies are not dependent on his return of the goods, nor is he bound to give notice to the vendor; "but," he adds, "a failure to return the goods, or complain of the quality, raises a strong presumption that the complaint of defective quality is not well founded. Professor Parsons, in the text and notes of his work on contracts, lays down the same legal propositions that Mr. Benjamin does, making not a word of allusion to there being any difference in the application of them between sales executed and sales executory. He also states that if the buyer accepts goods inferior to such as are stipulated for, his continued possession without complaint will be a presumption against him on the question of damages: Parsons on Contracts, 6th ed., \*591, and notes.

Mr. Smith, in *Leading Cases*, in notes to the case of *Chandelor v. Lopus*, discusses and fully indorses the same rules, as deducible from the authorities, and he and the editors in the last American edition of that work cite and compare a great many of the decided cases on the subject, and they give no recognition to a distinction between executed and executory contracts in the application of such remedies. We quote a few passages from their comments: "When specific property is referred to, still, if the reference be through the medium of a sample, the contract will be so far executory as to fail of effect, unless the bulk of the commodity corresponds with the sample. . . . Nor will his [buyer's] right to indemnity or compensation necessarily end on his acceptance and use of the goods with full knowledge of the defect, but he will be entitled to bring suit on the contract, and receive damages for the breach of the implied engagement that the bulk of the commodity should correspond with the sample exhibited at the time of the sale." In the case at bar, there was an ideal

or descriptive sample,—a description equivalent to the exhibition of a sample. There can be no doubt that if the vendee may bring an action of his own on the contract, he can as well defend against an action brought upon the contract by the vendor. "The right of the vendee to rely on the breach of warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase-money, may now be regarded as established in England and in most of the courts in this country. . . . The course of decision at the present day tends towards the position that a partial failure of consideration may be given in evidence in mitigation of damages, even when the original contract remains in full force, and the suit is expressly or impliedly founded upon it. . . . In the case of *Withers v. Greene*, 9 How. 213, the supreme court of the United States receded from the ground taken in *Thornton v. Wynn*, 12 Wheat. 183, by holding that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defense to an action brought by the vendor. The same rule applies to sales under an executory contract, or by sample, and the buyer may rely on the deficiency of value resulting from the failure of the property sold to correspond with the terms of the contract as a reason why he should not be compelled to pay the price in full: *Mandel v. Steel*, 8 Mees. & W. 858; *Babcock v. Trice*, 18 Ill. 420; 68 Am. Dec. 560; *Dailey v. Green*, 15 Pa. St. 118."

We are unable to find in the English cases much support for any discrimination in the application of the above doctrine between sales executed and sales executory, although very many of the modern English cases arise out of sample sales and other contracts of an executory nature. The principal support for it is found in some of the New York cases, and in those of a few other states that have followed the lead of the New York court in this respect. There are cases which hold to a modification of some of these forms of remedy, having no bearing, however, on the decision of the present case. Some courts have held that a rejection or rescission is not allowable if the goods tendered are of the kind or species contracted for, even though the quality be inferior. But in this state the doctrine of rescission in cases of warranty has been fully established: *Marston v. Knight*, 29 Me. 341. In a few cases there is a leaning towards the doctrine that an acceptance becomes a waiver after a long-continued acquiescence on the

part of the vendee: 1 Smith's Lead. Cas., 8th ed., pt. 1, pp. 324, 326, 360, 362 et seq.

It is noticeable that in the more modern English cases the courts have preferred to regard executory contracts as based upon a condition precedent, rather than upon warranty. No essential difference of remedy follows from it, though a different style of pleading may be apposite. Instead of a breach of warranty and a suit upon warranty, it becomes, on the new idea, a failure to perform a condition precedent and a suit on the contract. In *Leading Cases*, before cited, the commentator expresses the theory in an alternative way, in these words: "The right of a vendee to rely on the breach of a mere warranty, or a failure to comply with the terms of an executory contract, as a defense to an action for the purchase-money may now be regarded as established in England, and in most of the courts in this country." But the editor at the same time says (p. 334) that "such cases have generally proceeded on the ground of an express or implied warranty." See also, in volume 2, part 1, Smith's *Leading Cases*, the discussion under case of *Cutter v. Powell*, at pp. 18, 20, 22 et seq. Mr. Benjamin inclines to the view taken in the English cases, quoting Lord Abinger as deprecating the prevalent habit of treating a condition precedent as a warranty. Other writers incline favorably towards the views of Lord Abinger as expressed by him in the case of *Chanter v. Hopkins*, 4 Mees. & W. 399, although admitting that the prevailing theory continues the other way.

The length of this opinion reasonably precludes further discussion of points that may be regarded as merely theoretical. Whether in the present case it be a condition or a warranty,—and that might be at the election of the defendant to determine as he pleased,—we think the defense set up to the action should have been heard upon the ground of a breach of condition or of warranty, or upon both grounds.

The main question for our decision has not been the subject of much discussion in our own state, although the principle involved has been acted on in a great number of instances, and there have been judicial expressions and rulings affecting it. In *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 522, it is allowed that evidence of consideration may be received in actions between the parties to a contract, to reduce the damages. In *Herbert v. Ford*, 29 Me. 546, the doctrine is approved. *Rogers v. Humphrey*, 39 Me. 382, directly applies to the pres-

ent facts. It is there held that "when a party seeks to recover payment for articles delivered under a special contract which he has not fully performed, the damages suffered by such breach may legally be deducted in the same suit." The case of *Peabody v. Maguire*, 79 Me. 572, in its effect sustains the same principle. It is there decided that in a conditional sale the mere fact of delivery by the vendor without performance by the vendee, nothing being at the time said about the condition, might afford presumptive evidence of the waiver of the condition, but that the fact may be explained and controlled, and whether it be a waiver of the right of title or not would be a question of fact to be ascertained from the testimony. So in the present case, whether acceptance be a waiver of the full performance of the condition precedent, or not, is likewise a question to be settled upon testimony. The position of parties is reversed in the two cases, but the principle is the same.

The first case in this country, except a Maryland decision to the same effect, and perhaps the leading case in the recognition of the principle that affirmation of quality establishes warranty, is *Hastings v. Lovering*, 2 Pick. 214, 13 Am. Dec. 420, where oil then in Nantucket was sold to be delivered in Boston in ten days, the vendor describing the same to be "prime winter oil." That was in fact as much of an executory contract as is the one under discussion, although not in form such. The point was taken in the trial that the contract, although executory, was settled by a bill of parcels given at delivery, the executory agreement having no further effect. But the court overruled the position. The case is effective on the present question as showing that acceptance has no greater effect as an estoppel in executory than in executed sales. Other Massachusetts cases bear, either directly or indirectly, upon the question. In none of them is there any judicial utterance indicating that executory and executed sales do not on this question stand alike: *Perley v. Balch*, 23 Pick. 238; 34 Am. Dec. 56; *Dorr v. Fisher*, 1 Cush. 271; *Henshaw v. Robins*, 9 Met. 83; 43 Am. Dec. 367; *Mixer v. Coburn*, 11 Met. 559; 45 Am. Dec. 280; *Morse v. Brackett*, 98 Mass. 206. Several Connecticut cases that are often cited as supporting the theory that description imports warranty, and that the defendant may recoup damages for a breach of contract if the vendor brings a suit, were cases of executory contracts or sales: *McAlpin v. Lee*, 12 Conn. 129; 30 Am. Dec. 609; *Kellogg v. Denbow*, 14 Conn. 411. And of the same character is the

leading case in the supreme court of the United States on the same question: *Lyon v. Bertram*, 20 How. 150. In that case the vendor was to deliver a cargo of flour within three weeks, the price to be according to an inspection to be made at delivery. The contract was in form a sale, but, in effect, a contract for future sale and delivery. The same deduction may be made from the cases of so many of the states that the rule may be fairly characterized as general. And the same result is producible from the English cases.

The New York court held in earlier cases that warranty in an executory contract did not, in ordinary circumstances, survive delivery and acceptance. But the doctrine grew up from the theory of law, maintained for a great while by that court, that description of quality is not a warranty of quality. In *Leading Cases*, before cited, it is said, in distinguishing the New York theory from that of Massachusetts and Pennsylvania: "The authorities in New York assume that calling a thing by a particular name, or designating as of a certain quality, is no evidence of a warranty or contract that it should be as described." Certainly, a thing cannot survive that does not exist. Wilde, J., in *Henshaw v. Robins*, 9 Met. 90, 42 Am. Dec. 367, declared upon that ground that the authorities in New York were without influence upon the question of effect of acceptance in Massachusetts, saying: "Opposed to these authorities are the cases in New York; but these were determined on the assumption that there was no warranty, express or implied, and they, therefore, have no bearing on the question as to the effect of the inspection of the goods sold by the purchaser."

The last-named rule of the New York cases was found to be so much at variance with the authorities elsewhere that in the case of *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 12, all previous cases which held that warranty did not follow from description of quality were overruled. And as a natural, if not necessary, consequence thereof, the tendency of that court seems in later cases to have been progressive towards the adoption of the other rule, that acceptance in cases of executory sales with warranty does not preclude the vendee from afterwards claiming damages against the vendor for a breach of the warranty, if the court has not already arrived at that point. There are late cases, in that state, of express warranties, the doctrine of which seems to completely vindicate the position of the defendant in the present case, even should

he be obliged to stand or fall upon the interpretation of the law of his contract according to the New York authorities. In *Brigg v. Hilton*, 99 N. Y. 517, 52 Am. Rep. 63, and in *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, it is declared that an express undertaking to deliver in the future articles of a certain quality was an express warranty of such quality when the articles were afterwards delivered,—a warranty that survived an acceptance of the articles delivered,—and that the rule would be the same whether the goods were in existence at the time of contract of sale or were to be manufactured.

Upon the authority of these cases the contract in the case at bar contains an express warranty. An express undertaking to produce a thing is an express warranty of the thing produced.

Exceptions sustained.

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**WARRANTY—IMPLIED FROM DESCRIPTIVE WORDS.**—“No. 2 white mixed corn” implies a warranty on the part of the seller as to the variety: *Miller v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329, and note. In sales of goods by sample, there is always an implied warranty that the goods are of the kind and quality of the sample: *Brigham v. Reteledorf*, 73 Iowa, 712; *Weed v. Dyer*, 53 Ark. 155. Where the seller said that the horse was sound, and just the sort of horse that the purchaser would want for a driving horse, and it proved to have an incurable disease of the feet, there was a breach of warranty: *Murphy v. McGraw*, 74 Mich. 318. Every person who manufactures an article under description for a particular purpose warrants by the sale of it that it is reasonably fit for that purpose: *Fox v. Stockton etc. Works*, 83 Cal. 333.

**SALES—WARRANTY IN EXECUTORY CONTRACT—RIGHT TO RETAIN PROPERTY AND SUE FOR BREACH.**—Where a contract is executory, with a warranty, the acceptance and use of the property is not a waiver of the right to claim damages for a breach of warranty: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40, and note; *Eastern Ice Co. v. King*, 86 Va. 97; *Murphy v. McGraw*, 74 Mich. 318.

**SALES—BREACH OF WARRANTY—RIGHTS OF PURCHASER.**—Where a contract of sale is executory, with a warranty, upon breach of the warranty the buyer may refuse to accept the goods and return them, or he may accept them and sue for a breach of the warranty, or rely upon the damages for such breach in reduction in an action for the contract price: *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40, and note; *Weed v. Dyer*, 53 Ark. 155.

**MAKER v. LAZELL.**

[83 MAINE, 562.]

**DEEDS, CONSTRUCTION OF. — A GRANTOR CANNOT DESTROY HIS OWN GRANT,** however much he may modify or load it with conditions. Having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it.

**DEEDS, LIMITING EFFECT OF, TO A PARTICULAR CLAIM OF TITLE. —** If a conveyance purports to convey a tract of land, its effect cannot be limited or diminished by adding that it is intended to convey the title which was conveyed to the grantor by the deed of E. C. B., though the latter deed did not convey any title whatever.

*J. H. and C. O. Montgomery*, for the petitioner.

*J. P. Cilley*, for the defendant.

**EMERY, J.** The plaintiff, by this petition for partition, seeks to have two sevenths of Lassell Island, in Penobscot Bay, set off to him in severalty. The defendant denies the plaintiff's title.

Both parties claim under Carver and Ames, who, at the time of their deed to the plaintiff, were the admitted owners of the whole island in fee. Their deed to the plaintiff was the earlier deed, and was in the usual form of a quitclaim deed, with covenants of warranty against all persons claiming under them, and was duly executed, acknowledged, and recorded. The granting clause and description were in the following words: "We [Carver and Ames] . . . do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Maker, and his heirs and assigns forever, all our right, title, and interest in and to two sevenths of an island known as Lassell Island, in Penobscot Bay. . . . This deed is intended to convey two sevenths of the title which was conveyed to us by deed of Edwin C. Burleigh, of said island; and, agreeably to clause in said Burleigh's deed, should the title of the state in said island be found not to be in the state, and the consideration money be repaid to us, we agree to refund to said Maker two sevenths of the amount received back from the state, and deducting charges and expenses of obtaining the same. To have and to hold," etc.

The plaintiff put the foregoing deed to him in evidence, and rested.

The defendant claimed title under a subsequent deed of the same island from the same grantors. The defendant then asked the court to take judicial notice that Edwin C. Burleigh was, at the time, the state land agent, and that his

deed, referred to in the deed to the plaintiff, was a deed of the state's title, if any. He then offered to show by various kinds of evidence *aliunde* that the state had no title to convey; that no title passed to Carver and Ames by the Burleigh deed; that the state, by legislative resolve, had, for that reason, repaid to Carver and Ames the consideration money under that deed; and that Carver and Ames had settled with Maker for two sevenths of the same, the latter accepting the settlement in full for his claim under their deed to him.

The presiding justice ruled that all the defendant's offered evidence was immaterial, and that, the title of Carver and Ames from other sources being admitted, their deed to the plaintiff vested in him two sevenths of the island. Partition was ordered accordingly. To these rulings the defendant excepted.

The defendant's contention is substantially as follows: The language of the deed to the plaintiff, especially the clause beginning "this deed is intended," etc. (as before quoted), read in the light of the attending circumstances (which they offered to show), would make it manifest that the deed was only intended to assign to the plaintiff two sevenths of whatever title Carver and Ames acquired under the Burleigh deed, they retaining all title they may have acquired from any other source. The offered evidence would have shown that the Burleigh deed conveyed no title, and hence that the deed of Carver and Ames to the plaintiff conveyed to him none of their title. In other words, the defendant contends that all the language of the deed, and the facts to be shown by his offered evidence, would have destroyed the deed as an instrument of conveyance of an interest in land, and left it, with all its formalities, a mere promise to account for money.

In support of this contention, the defendant invokes the broad proposition that, in considering written instruments, courts should always seek for the actual intent of the parties, and give effect to that intent when found, whatever the form of the instrument. The proposition has been stated perhaps as broadly as this in text-books and judicial opinions, but it is not universally true. It is hedged about by some positive rules of law, which the parties must heed if they would effectuate their intent, or avoid consequences they did not intend. Muniments of title especially are guarded by positive rules of law, to secure their certainty, precision, and permanency. If, in the effort to ascertain the real intent of parties,



one of these rules is encountered, it must control; for no positive rule of law can be lawfully violated in the search for intent.

Some of these rules prevent an intent from becoming effectual, however clearly expressed, because the language required by the rule was not used. A deed of conveyance will not ordinarily operate to convey an estate of inheritance, unless it contains the word "heirs," however clearly the grantor may have expressed that intent in other words. Some of the rules will give a deed a different effect from that which the grantor plainly expressed. The famous rule in *Shielley's case* is an example. In *Thong v. Bedford*, 4 Maule & S. 362, a testator devised lands to his daughter for her life, remainder to the heirs of her body, and then explicitly declared it to be his "will and meaning" that his daughter should only have an estate for life. It was held, however, by the king's bench, per Lord Ellenborough, C. J., that the daughter nevertheless took an estate-tail.

There is one rule pertaining to the construction of deeds, as ancient; general; and rigorous as any other. It is the rule that a grantor cannot destroy his own grant; however much he may modify it or load it with conditions,—the rule that having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it: 11 Bac. Abr. 665; *Shep. Touch.* 79, 102. We do not find that this rule has ever been disregarded, or even seriously questioned, by courts. We find it often stated, approved, and sometimes made a rule of decision. In *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sr. 74, Lord Chancellor Hardwicke, "in whose judgments equity shone resplendent," declared that the courts, either of law or equity, should not adopt such a construction of an instrument of devise as would defeat the interests given. In *Cholmondeley v. Clinton*, 2 Jacob & W. 84, which was a case most elaborately argued and considered, it was said by the court that where a limitation in a deed is perfect and complete, it cannot be controlled by intention collected from other parts of the same deed.

The rule has been recognized and acted upon in the United States. In *Budd v. Brooke*, 3 Gill, 198, 43 Am. Dec. 321, and *Winter v. Gorsuch*, 51 Md. 180, the Maryland supreme court, distinguished for its opinions on real estate law, declared that a grantor cannot contradict or retract, in any subsequent part of his deed, a grant made in the premises. In *Ackerman v. Vreeland*, 14 N. J. Eq. 23, the equity court of

New Jersey recognized the rule by giving a deed of release full effect as a conveyance, although actually intended only as a partition. In *Wilder v. Davenport*, 58 Vt. 642, the grantor in a deed described the land conveyed by metes and bounds, and then added the clause "Intending hereby to convey the same lands, and no other, which passed to me by virtue of" (a certain mortgage). The court found as matter of fact that the parties only contemplated the land acquired by the mortgage. The metes and bounds description, however, included other land. The court held that the additional land included in the first description passed by the deed. In *Cutler v. Tufts*, 3 Pick. 272, the grantor conveyed in terms an undivided moiety, and then added words which it was afterwards claimed clearly showed that he really intended to convey an undivided fourth only. The court held that if such was the meaning, the clause should be rejected for repugnance. In *Wilcoxon v. Sprague*, 51 Cal. 640, the grantor (Howard) conveyed, in terms, in the granting clause of his deed, all his "right, title, and estate in and to all" the tract of land described, and then next inserted the following clause: "It is expressly agreed that the interest hereby conveyed by the said Howard is that only which he acquired by conveyance from S. C. Bruce." It was found, however, that Howard had acquired no interest by the conveyance to him from S. C. Bruce. The court held, nevertheless, that the quoted clause could not destroy the grant, and that all of Howard's interest was conveyed. In *Green Bay etc. Co. v. Hewett*, 55 Wis. 96, 42 Am. Rep. 701, the grantor (Martin) "released, quitclaimed, and conveyed [to the plaintiff] all his claim, right, title, and interest of every name and nature, legal and equitable, in and to" the described property. The deed, however, contained, after the description, this clause: "The interest and title intended to be conveyed by this deed is that, and that only, acquired by said Martin by virtue of a deed" from one Evarts. The deed from Evarts conveyed only half the land. It was held that this declaration of intent could not weaken the force of prior words of grant.

We think no case has arisen before in Maine calling for the application or rejection of the rule. The court, however, has occasionally referred to the rule as an existing and binding rule: See *Pike v. Monroe*, 36 Me. 316; 58 Am. Dec. 751; *Bates v. Foster*, 59 Me. 160; 8 Am. Rep. 406; *Bodwell G. Co. v. Lane*, 83 Me. 168.

This rule in no way hampers the court in seeking for the real intention of the parties, as to what or how much land was intended to be conveyed, or as to the extent and duration of the estate intended to be created or transferred, or as to the various conditions, reservations, or exceptions in a deed. It gives full effect to all words in a deed explanatory of a grant. It refuses effect only to language destructive of the grant.

In the deed under consideration, the grantors expressly, and in terms, declared that they did "remit, release, bargain, sell, and convey, and forever quitclaim . . . all their right, title, and interest" in the land. They used words which for centuries have been used in similar instruments to effect a conveyance of title. The words, in themselves and by ancient association, as plainly and explicitly import an intention to convey title as any in the language. The statute (R. S., c. 43, sec. 14) enacts that such words (being the usual words in a quitclaim deed) shall convey the grantor's title as effectually as any other form of words.

No question is raised as to the identity or amount of land, as to the nature or duration of the estate, as to any condition, reservation, or exception. It is contended, however, that the next paragraph (the clause in relation to the Burleigh deed, and quoted in the statement of the case), with the circumstances offered in evidence, completely nullifies the grant thus explicitly and formally made, and destroys, as an instrument of conveyance, the deed thus solemnly framed and executed. If such be the meaning and intention of that paragraph,—if such was the purpose of its insertion in the deed,—we think the rule above stated prevents our giving it any such effect, and compels us to reject it as repugnant to the grant.

If it be true that the grantors, in spite of their explicit words, did not in fact intend their instrument to operate as a grant, the remedy, if any, is on the equity side of the court, by way of a cancellation or reformation of the instrument. So long as the deed remains in its present form uncanceled, it must stand as a muniment of title in the plaintiff, his heirs and assigns. Titles to real estate are more certain and secure by being thus moored to an ancient and well-known rule, than by being left to drift in a whirlpool of conflicting expressions of intention.

Exceptions overruled.

**DEEDS—CONTRADICTORY CLAUSES.**—The owner of land made a quitclaim deed of all of his right, title, and interest in the land. By a subsequent clause he declared that the only right, title, and interest that he intended to convey was that derived through a certain deed. It was held that the grantor's whole interest passed: *Green Bay, etc. Co. v. Hancock*, 55 Wm. 95; 42 Am. Rep. 701. Whatever is expressly granted, covenanted, or promised cannot be restricted or diminished by subsequent provisions: *Pike v. Monroe*; 38 Me. 309; 58 Am. Dec. 751, and note; *McLennon v. McDonnell*, 78 Cal. 273; *Thornton v. Attring*, 115 Ill. 55. The fact that a deed contains an unauthorized covenant of warranty will not impair its effect as a conveyance of title: *Pack v. Brown*, 98 Me. 676. A reservation or exception in a deed, repugnant to the estate described in the granting clause, is void: *Pyncheon v. Stearns*, 11 Met. 312; 45 Am. Dec. 210, and note.

**CASES**  
IN THE  
**SUPREME JUDICIAL COURT**  
OF  
**MASSACHUSETTS.**

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**DAVIS v. JACKSON.**

(SEE MASSACHUSETTS, 21.)

**LIKE TENANT AND REMAINDERMAN.** — IF A DIVIDEND IS DECLARED BY A CORPORATION of twenty-five dollars for each share of its stock, and any stockholder who wishes is entitled to take an additional share of stock for every four shares held by him, instead of receiving his dividend in money, and the earnings of the corporation are sufficient to pay the dividend, but if used for that purpose, then it will become necessary to raise an equivalent to pay for the additions which had been made to the capital, and which had increased its value at least twenty-five per cent above the par value of the whole stock, the dividend so declared is not a stock dividend, but must be treated as income, to which the life tenant is entitled.

**CORPORATIONS.** — THE MERE INCURRING OF A DEBT FOR CAPITAL does not, of itself, amount to an appropriation to capital of all the income on hand.

**CORPORATIONS.** — DIVIDEND REPRESENTING PROFITS IS NO LESS TO BE TAKEN AS INCOME because a stockholder is at liberty to invest it at par in stock which is worth more than par, if he is also at liberty to sell the right to subscribe for the stock.

*R. H. Gardiner*, for the plaintiffs.

*G. Putnam*, for the life tenants.

*E. Merwin*, for the remaindermen.

**HOLMES, J.** This is a bill brought by the trustees under the will of Benjamin Sewall for instructions whether a dividend declared by the Ludlow Manufacturing Company is capital or income, the plaintiffs holding stock in that company as part of a fund the net income of which is limited by the will to certain of the defendants for life, with remainder over

of the principal to the others. The facts are as follows: On April 26, 1889, at a stockholders' meeting, it was voted that the capital stock be increased by one thousand shares of one hundred dollars each, and that the stockholders be entitled to subscribe in proportion to the number of their shares, if they paid within thirty days. This vote allowed each stockholder to take one new share for every four held by him. At a meeting of the directors held on the same day, at the close of the stockholders' meeting, an extra dividend of twenty-five dollars a share was declared. This dividend was exactly sufficient to enable the stockholders to pay for their new stock, if they were so minded. But they were not bound to take the stock, and if they preferred to keep the money, and to sell their rights to subscribe for stock, they could do so, as some of them did in fact. On the day after the dividend was declared, the company had a balance in the bank sufficient to pay the dividend checks, except the amount payable to certain directors, with whom the treasurer arranged that they should delay a few days, until the balance was increased. The earnings of the company were sufficient to pay the dividend, but if they were used to pay the dividend, then it was necessary to raise about an equal amount to pay for additions which had been made to the capital, and which had increased its value at least twenty-five per cent above the par value of the old stock. The directors would testify, if material, that they discussed the question of a stock dividend, and understood that it was not permitted by law, and declared the extra dividend as a substitute.

The argument for the remaindermen is, that the transactions of the company, viewed as a whole, are, in substance, a stock dividend. It is tacitly assumed that the company had appropriated its earnings to the improvements which the stock represented before the dividend was declared, and then the conclusion is drawn that the dividend represented those improvements.

But, in the opinion of a majority of the court, it is evident that, if we look at either extreme of the facts, the life tenants ought to prevail. The dividend was declared as a cash dividend, and it represented what, originally at least, were earnings of the company. In justice, the earnings of the company ought to go to the life tenants. If the only thing to be considered by the corporation was the relation between tenants for life and remaindermen, it would have no right to devote in-

come to increasing capital; if it wished to increase its plant, it would have to do it by borrowing money or by issuing more stock. In fact, it has the right to appropriate income to permanent improvements, because it has a right to manage its affairs in the way it deems best for them: *Minot v. Paine*, 99 Mass. 101, 106; 96 Am. Dec. 705; but where the form of its transactions has not that effect, there is no reason why courts should be astute to bring it about. The remaindermen rely upon the fact that, before the dividend was declared, debts to an equal amount had been incurred for permanent improvements. But the mere incurring of a debt for capital did not, of itself, amount to an appropriation to capital of all the income on hand. The corporation was still free to choose how it would deal with its gains. When it did choose, it elected to distribute them. If the plaintiff trustees had seen fit to keep the money and to sell their rights, they could have done so, and neither the corporation nor the *cestuis que trust* could have complained. Of course, the trustees could not affect the respective rights of the defendants by their determination. If they had kept the dividend, it would have been a bold claim on the part of the remaindermen that it was theirs because the corporation was in debt for additions to capital.

It is suggested that the vote of the stockholders and that of the directors, taken together, made a mere substitute for a stock dividend, as in *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121, and *Daland v. Williams*, 101 Mass. 571. They made a substitute, in the sense of making a different thing in form and substance. A dividend of cash representing profits is none the less to be taken as income because the stockholder is at liberty to invest it at par in stock which is worth more than par, if he is also at liberty to sell the right to subscribe for the stock. In *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121, the dividend in cash was a mere form, and was required by the votes under which it was declared to be applied in payment for the new stock. In *Daland v. Williams*, 101 Mass. 571, it appeared expressly that the company had previously appropriated its profits to permanent improvements. Furthermore, the court assumed that the only alternative for the stockholder was to take money equal to the par value of the stock to which he was entitled, or shares worth sixty-three dollars more than par; in other words, that he could not sell the right to take the shares if he kept the cash dividend. Of

course, under those circumstances, the cash dividend was only a form, and the vote declaring it treated it as such, by providing "that the treasurer be authorized to receive said dividend in payment for two thousand eight hundred shares of stock in this company, and to issue certificates of stock for said dividend." It was not contemplated that any one should receive money, but only that he should turn over a formal right to receive money, and should in fact receive shares. In the case at bar, as we have said, the profits had not been appropriated to improvements, and the right to receive the money was a substantial right, which was expected to be exercised, and was exercised in fact.

If the trustees had sold their rights, the proceeds would have represented the detriment to the old shares caused by the issue of new ones, and would have belonged to capital. It is admitted that the value of this right belongs to the remainderman: *Atkins v. Albree*, 12 Allen, 359. See *Leland v. Hayden*, 102 Mass. 542.

Decree accordingly.

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CORPORATIONS — STOCK — DIVIDENDS — INCREASE OF CAPITAL — LIFE TENANT AND REMAINDERMAN. — The weight of authority seems to be, that dividends derived from the earnings of the company, no matter when such earnings were realized, belong to the life tenant, if they were declared during the existence of the estate, even though they are stock dividends: Note to *Gibbons v. Mahon*, 54 Am. Rep. 264; *Estate of Smith*, 140 Pa. St. 344; ante, p. 237, and note. But see *Oliver's Estate*, 136 Pa. St. 43; 20 Am. St. Rep. 384, and note.

## RICE v. SANDERS.

[152 MASSACHUSETTS, 108.]

GRANTEE WHO ASSUMES AND AGREES TO PAY TWO MORTGAGES made by the grantor of the lands granted undertakes to relieve the grantor not only from personal liability for the debt, but also from all liability under the mortgages, and if the grantor has such an interest in the property as to be actually damaged by the failure to remove the mortgages, he may recover his actual damages, notwithstanding he has been relieved from personal liability upon the debt.

LIABILITY OF GRANTEE FOR NOT DISCHARGING MORTGAGES. — If a grantee agrees to pay two mortgages made by the grantor, and failing to pay the one which first falls due, the property is sold thereunder and the mortgage thereby paid, the grantor is entitled at once to maintain an action for the failure to pay the mortgage, though the second mortgage is not yet due, because it was the duty of the grantee, by paying off the first mortgage, to make the security of the second good, and thus to



keep the grantee harmless against the covenants therein made, and the measure of damages may be the amount of the second mortgage.

**SET-OFF.** — A CLAIM FOR UNLIQUIDATED DAMAGES for a breach of contract cannot be set off against another claim of the same character.

**ACTION** to recover for a breach of the defendant's agreement to assume and pay two mortgages made by the plaintiff, and which the defendant agreed to pay as part of the consideration for the transfer to him of the lands subject to such mortgages. When the first mortgage became due, the mortgages demanded payment, and thereafter sold the property in satisfaction of the debt, leaving the second mortgage still unpaid, but not yet due. The defendant claimed as a set-off damages resulting to him from the plaintiff's failure to pay the mortgage on another tract of land which the plaintiff had agreed to pay.

*S. T. Field*, for the plaintiff.

*S. Sanders*, pro ea.

**KNOWLTON, J.** By accepting his deed from the plaintiff, the defendant assumed and agreed to pay two mortgages, of which one was then overdue, and the other was payable by installments to become due in the future. It was a single but divisible contract, containing a promise, first, to pay one mortgage immediately, and secondly, to pay the other when it should become due. In proceedings to recover damages for a breach of the contract, each part of it should be considered separately. It is agreed that there has been no breach as to the second mortgage, and damages can be recovered in this action only for neglect to assume and pay the first mortgage. The plaintiff claims damages of two kinds: 1. Those resulting from the defendant's failure to relieve him from personal liability on the mortgage debt; and 2. Those growing out of the defendant's neglect to obtain a discharge of the first mortgage, whereby the plaintiff has been deprived of a benefit which should have resulted to his security for the payment of the second mortgage. If he can recover only for the failure to relieve him from liability on the mortgage debt, the damage should be only nominal; for before the action was brought, the mortgage was foreclosed, and the debt was paid from the proceeds of the sale of the mortgaged property. If, on the other hand, he can recover on account of the defendant's neglect to do that which would have worked a discharge of the first

mortgage, it does not appear that the assessment was erroneous. Our decision, therefore, must depend upon whether a grantee in a deed, who assumes and agrees to pay a mortgage on the property conveyed, undertakes thereby to terminate the vital existence of the mortgage, or only to cancel the mortgage debt, so far as it is a claim against individuals, without discharging the mortgagee's lien upon the land.

One who assumes a mortgage in such an agreement takes upon himself the burden of the debt or claim secured by the mortgage, and there is no doubt that, as between him and his grantor, he becomes the principal, and the latter merely a surety for the payment of the debt. It is said in many cases that, primarily, the mortgage is a charge upon the land; but it would be more accurate to say that it is made primarily a charge upon the purchase-money reserved by the grantee to pay it: *Thayer v. Torrey*, 37 N. J. L. 339. The relation of the parties and the nature of the contract are the same as if the entire consideration had been paid to the grantor, and he had then taken a part of the money sufficient to pay the mortgage, and had intrusted it to the grantee upon his promise to carry it to the mortgagee and pay it over in satisfaction of the mortgage. Performance of the promise would cancel the mortgage, and leave the estate discharged from the lien. If, as a part of the contract, another portion of the consideration had been paid by giving a second mortgage on the property, the discharge of the first mortgage by payment of the money as agreed might be a very important part of the arrangement, without which the second mortgage would be valueless.

In assuming the mortgage, the grantee undertakes to relieve the mortgagor, not only from personal liability for the debt, but also from all liability under the mortgage. If the mortgagor were released from the debt, while the mortgage was allowed to remain a binding contract enforceable against the land, he would still be liable on the covenants and agreements contained in the mortgage. The implied contract would not be performed so long as the mortgage was outstanding as a valid instrument upon which the mortgagor could in any form be liable. None of the cases which have come to our attention imply that the payment to be made by a grantee in such a case is anything less than an ordinary payment, which works a complete discharge of the mortgage. The reasoning upon which it is held that the damage to be

recovered for a breach of such a contract is the amount of the mortgage debt, if no part of it has been paid, and the authorities cited in support of that doctrine rest upon the ground that an absolute payment should be made. And where there is an express agreement to pay, the word "pay" is used in its usual sense: *Braman v. Dowse*, 12 Cush. 227; *Furnas v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93; 41 Am. Rep. 199, and cases cited. It follows that, in an ordinary case of this kind, if a grantee who has assumed a mortgage should procure from the mortgagee a discharge of the mortgagor from personal liability upon the debt, and leave the mortgage still in force, he could be sued by his grantor for a breach of his contract, and nominal damage could be recovered if no actual damage was shown. If the grantor had such an interest in the property covered by the mortgage as to be actually damaged by the failure to remove the mortgage, he might recover his actual damages notwithstanding that he had been relieved from personal liability upon the debt.

In the case at bar, the plaintiff suffered no actual damage by reason of his liability upon the debt, for that was paid by a sale of the mortgaged premises; but under the second mortgage he had security on the property for his liability named in that, and he was interested in having the first mortgage satisfied and discharged for the improvement of his security. As a direct result of the breach of the contract, he was deprived of that security. The damage which he has suffered is not too remote, but must be presumed to have been contemplated by the parties when they made their contract.

The only remaining objection to his recovery of this damage is, that it is uncertain whether he will ever be required to pay the debt covered by the second mortgage. But there is much authority for holding that this fact can make no difference in favor of one who has failed to perform his contract. The defendant should have paid a sum of money which would have given the plaintiff perfect security for the payment by the defendant of the debt upon which the plaintiff is liable. The plaintiff's cause of action for this breach has already accrued. There can be but one recovery upon it, and all his damages must be assessed now. He was entitled to a security which would have been perfect for the amount of the debt. Through the defendant's fault he has no security. His

damage is the value of the security which he should have had, up to and not exceeding the amount of the debt secured: *Lothbridge v. Mytton*, 2 Barn. & Adol. 772; *Brown v. Howard*, 2 Brod. & B. 78; *Howell v. Young*, 5 Barn. & C. 289; *Leesemore v. Radford*, 9 Mees. & W. 457; *Lathrop v. Atwood*, 21 Conn. 117; *Port v. Jackson*, 17 Johns. 259; *In re Negus*, 7 Wend. 499; *Crofoot v. Moore*, 4 Vt. 284; *Wilson v. Stilwell*, 9 Ohio St. 467; 75 Am. Dec. 477; *Stout v. Folger*, 34 Iowa, 71; 11 Am. Rep. 138; *Ham v. Hill*, 29 Mo. 275; *Lacke v. Homer*, 121 Mass. 99; 41 Am. Rep. 199.

The principle involved is the same as that in *Furness v. Dargie*, 119 Mass. 509, and other similar cases. In that case it was uncertain whether the plaintiff would ever be called upon to pay any part of the money which he recovered, for the note might be paid by a sale of the land under the mortgage. We are of opinion, therefore, that the plaintiff was rightfully allowed to recover damages for the loss of his security, caused by the defendant's neglect to perform his contract.

The defendant cannot maintain his declaration in set-off. The action was brought to recover unliquidated damages for a breach of contract, and the claim sought to be set off is of the same kind, and is not within the statute: Pub. Stats., c. 168, secs. 3-7.

Judgment affirmed

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FIELD, DEVENS, and WILLIAM ALLEN, JJ., dissented from the foregoing opinion. They insisted that the opinion of the majority of the court was founded upon a misconception of the nature of the contract of the defendant; that that contract was merely a personal contract by the defendant with the plaintiff to pay the mortgage debts when they should become payable, so that the plaintiff, who had parted with his interest in the land, should not be called upon to pay them, but should be discharged from personal liability; that though the first mortgage debt was payable on demand, and a right of action accrued immediately to the plaintiff when the defendant refused to pay it, yet as such debt had been satisfied before the suit was brought, the plaintiff had no cause of action on account of the first mortgage; that as nothing was due on the debt secured by the second mortgage, the plaintiff had not acquired any cause of action on account of the failure to pay it; that if the defendant should pay the second mortgage when it became due, he would fully perform his promise, and it could not yet be known that he would not do so.

LIABILITY OF GRANTEE WHO ASSUMES THE PAYMENT OF MORTGAGE. — This question is discussed in *Klappworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69, and particularly note 72-90. See also *Gifford v. Corrigan*, 117 N. Y. 257; 15 Am. St. Rep. 508, and note. Where the grantee assumed a mortgage, after the mortgagee has adopted the transaction, the grantor cannot

release the grantee from such agreement without the consent of the mortgage; *New York L. Ins. Co. v. Aikin*, 125 N. Y. 602.

**SET-OFF — UNLIQUIDATED DAMAGES.** — Unliquidated damages arising on a breach of contract cannot be made the subject of a set-off, either in a court of law or equity: *Smith v. Washington G. Co.*, 31 Md. 12; 100 Am. Dec. 42, and note. In *Forbes v. Cooper*, 58 Ky. 225, it is decided that when a plaintiff is a non-resident, or insolvent, a demand for unliquidated damages may be set up by way of set-off by the defendant.

## HASKELL v. STARBIRD.

[JES MASSACHUSETTS, 1884]

**PRINCIPAL IS LIABLE FOR FALSE AND FRAUDULENT REPRESENTATIONS OF HIS AGENT** in effecting a sale of a tract of land, though he did not know of nor authorize such representations.

**PRINCIPAL AND AGENT.** — **ONE WHO EMPLOYS ANOTHER TO MAKE A SALE BECOMES RESPONSIBLE FOR THE METHODS WHICH HE ADOPTS IN SO DOING.**

**PRINCIPAL AND AGENT — LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.** —

There is no distinction in the matter of responsibility for fraud between an agent authorized to do business generally and an agent employed to conduct a single transaction, if, in each case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction.

**PRINCIPAL AND AGENT.** — **PRINCIPAL CANNOT ESCAPE LIABILITY FOR FALSE AND FRAUDULENT REPRESENTATIONS** by his agent to effect a sale of land by proving that the principal told the purchaser, before the sale was completed, that he had never seen the land, and knew nothing about it except what he had been informed.

*J. N. Marshall, M. L. Hamblet, and J. C. Burke*, for the defendant.

*C. Cowley*, for the plaintiff.

**DEVENS, J.** There was evidence that the purchase of a certain tract of land in Canada, in which purchase the plaintiff alleged himself to have been deceived, was made through one Rockwell, who acted as the agent for the defendant; and that the plaintiff was deceived by the representations made by Rockwell that the land was of the value of twelve hundred dollars, contained a large amount of timber, and was adjacent to a flourishing village, which representations were false. There was also evidence that Rockwell made these representations as the agent of the defendant. Rockwell also testified that the defendant made these representations to him, that he therefore made them to the plaintiff, and that before the conveyance was made he informed the defendant that he had so made them. While the statement as to the value of the land might be treated as an expression of opinion, only

those in reference to the locality of the land and the amount of timber on it were statements of fact of importance to any one proposing to purchase it; nor does the land appear to have been readily accessible, so that their accuracy could have been tested by the plaintiff. The defendant denied that he ever made any representations concerning the condition or location of the land, and offered evidence that at the time the conveyance was made by him he informed the plaintiff that he had never seen the land, and knew nothing about it except what he had been informed.

The defendant requested the court to instruct the jury as follows: "1. If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, and that as such agent he made the misrepresentations relied on, and that after the same were made, and at the time, but before the deed of this land was delivered, the defendant, in answer to inquiry made of him by the plaintiff, replied that he had never seen the land, and knew nothing about it except what had been told him, and the plaintiff, without further inquiry, accepted the deed and paid the consideration agreed on, he cannot recover; 2. If the jury shall find that Rockwell was the agent of the defendant in selling the land in question, the plaintiff cannot recover, unless it is proved that the defendant was privy to or adopted the misrepresentations relied on."

The court declined to give these instructions, and instructed the jury: "If the defendant employed and authorized Rockwell to sell the land, and in pursuance of that authority Rockwell sold the land and did induce the plaintiff to buy, and made false and fraudulent representations about the land, upon which the plaintiff relied and which induced him to purchase, I shall instruct you that the defendant would be responsible for that fraud, notwithstanding there were no instructions given to Rockwell by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practiced those fraudulent representations. Employing him as agent, or as his agent to do that thing, he became responsible for the methods which his agent adopted in doing that thing. . . . If the representations were false in fact, and Rockwell had no knowledge personally of the truth of these representations, but derived his information from others upon those facts, he, or the person for whom he was acting as the agent in the same, would be liable to an action for deceit."

The first instruction requested and refused should not have been given. It was an instruction on only a part of the evidence, and omitted entirely any consideration of the important testimony of Rockwell that he made the false representations acting as the defendant's agent, and upon his express authority, and also that the fact that they had been made was communicated to the defendant before the transaction was closed by the payment of the purchase-money and the making of the conveyance. Even if the testimony of Rockwell was denied by the defendant, and controverted by other evidence, the instruction asked, if given, would have led the jury to infer that it was unimportant for them to consider this evidence, and that the mere fact that the defendant made the remarks testified to by him at the time of passing the deed would prevent the plaintiff from recovering, while it might be also that the plaintiff, in completing the transaction, depended upon the false and fraudulent representations of the defendant's agent made at the defendant's own instance.

The contention of the defendant is, that the plaintiff having been put upon his guard by this conversation, he was affected by all the knowledge which he might have obtained if he had inquired further and elsewhere. But the defendant did not, in the conversation, in any way repudiate the representations of Rockwell, assuming them to have been made, or put the plaintiff on inquiry as to the correctness of them. On the contrary, the natural inference would be, that the defendant adopted them, although he disclaimed personal knowledge. If it is true that these statements of Rockwell had been falsely and fraudulently made, and especially if made on the authority of the defendant himself, and if they had induced the plaintiff to make the purchase, the defendant cannot extricate himself from responsibility therefor by such a disclaimer.

The instructions of the court upon the second request for a ruling — which was, in substance, that, even if Rockwell was the agent of the defendant to sell, the plaintiff could not recover unless it was proved that the defendant was privy to or adopted the misrepresentations relied on — made the defendant responsible for the false and fraudulent representations as to the land made by Rockwell, if Rockwell was employed by the defendant to sell the land as his agent, notwithstanding Rockwell was not authorized to make them, and notwithstanding the defendant did not know that he had made them until

after the conveyance. They held that the defendant, by employing Rockwell as his agent to make the sale, became responsible for the methods which he adopted in so doing. The defendant contends that Rockwell was a special agent only, and that, as his authority extended only to the sale of this single tract of land, the defendant is not responsible for any representations Rockwell might have made which he did not authorize.

The cases in which a distinction has been made in the responsibility of a principal for the acts of general and of special agents are those where the special agent did not have, and was not held out as having, full authority to do that which he undertook to do, and where one dealing with him was informed, or should have informed himself, of the limitations of his authority. There is no distinction in the matter of responsibility for the fraud of an agent authorized to do business generally, and of an agent employed to conduct a single transaction, if, in either case, he is acting in the business for which he was employed by the principal, and had full authority to complete the transaction. While the principal may not have authorized the particular act, he has put the agent in his place to make the sale, and must be responsible for the manner in which he has conducted himself in doing the business which the principal intrusted to him: *Benjamin on Sales*, 8d Am. ed., sec. 465. The rule that a principal is liable civilly for the neglect, fraud, deceit, or other wrongful act of his agent, although the principal did not in fact authorize the practice of such acts, is quoted with approbation by Chief Justice Shaw in *Locke v. Starnes*, 1 Met. 580; 35 Am. Dec. 382. That a principal is liable for the false representations of his agent, although personally innocent of the fraud, is said by Mr. Justice Hoar, in *White v. Sawyer*, 16 Gray, 586, 589, to be settled by the clear weight of authority.

In the case at bar, if the false representations were made by Rockwell, they were made by him while acting within the scope of his authority, in making a sale of land which the defendant employed him to sell, and the instruction properly held the defendant answerable for the damage occasioned thereby: *Lothrop v. Adams*, 133 Mass. 471; 43 Am. Rep. 523. The defendant urges that even if in an action of contract the false representations of Rockwell as his agent might render the defendant responsible as the principal, he cannot thus be made responsible in an action of tort for deceit, and that



in such action the misrepresentation must be proved to have been that of the principal. It is sufficient to say that no such point was presented at the trial, nor do we consider that any such distinction exists.

If the instruction "if the representations were false in fact," etc., is to be treated as an abstract proposition, intended to cover the whole case, and fully to state under what circumstances the defendant would be responsible, it would be obviously erroneous. It does not require that the representations should be fraudulent as well as false, and it does not contain the additional and necessary element that the plaintiff should have been misled and deceived by them. It is not, however, to be thus treated, but must be considered in its connection with the part of the case and the subject upon which instructions had been asked. Both sides had tried the case upon the assumption that Rockwell had made statements that were false, and that were also fraudulent, either as regarded himself or the defendant. Rockwell had testified, on behalf of the plaintiff, that he had made these representations upon the authority of the defendant, and upon information derived from him, which statement had been denied by the defendant. The instructions asked related solely to the question of agency, and do not themselves use the word "false" or "fraudulent," but only the word "misrepresentations." The instruction given in response to the request was, that the defendant would be liable for false and fraudulent representations made by Rockwell, if he employed him to sell the land, and if the latter made them under the defendant's authority in selling it. The correctness of the instructions on this point we have already considered. When, therefore, the presiding judge dealt with the liability of the defendant for representations made by Rockwell on the information of others,—the only information of Rockwell, so far as the case shows, being derived from the defendant,—he was dealing with false and fraudulent representations, by which the plaintiff was deceived, although in such case the falsity and fraud would be those of the defendant, acting through Rockwell as his instrument. The part of the case to which this instruction as well as the former ones relate assumes that the representations were of such a character that the defendant was liable therefor, if he was liable for the misrepresentations of Rockwell. Whether those representations themselves, in the terms in which they were made, were sufficient to make the

defendant liable belonged to another part of the case, not then under discussion, and to facts as to which appropriate instructions were given.

It is not a fair interpretation of the last instruction to hold, as the defendant contends, that it would allow the plaintiff to recover if there had been a representation erroneous in fact, and yet not knowingly so made, either by Rockwell, or by the defendant acting through Rockwell, nor do we think it could have been so understood.

Exceptions overruled.

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**AGENCY — LIABILITY OF PRINCIPAL FOR FRAUDS OF AGENT.** — A principal is responsible for the frauds and misrepresentations of his agent within the scope of his authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563; *Du Souchet v. Dutcher*, 113 Ind. 249; *Nichols v. Wadsworth*, 40 Minn. 547. This rule has been applied to frauds committed by agents in sales of realty: *Grinnold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878, and note.

In *Davies v. Lyon*, 36 Minn. 427, however, where one who had been constituted a special agent for the sole purpose of selling lot 5 fraudulently showed the purchaser lot 7, representing that it was lot 5, and the purchaser, relying upon such representation, purchased lot 5, and received a deed therefor, supposing that she had a deed to the lot pointed out to her by the agent, it was decided that the purchaser could not recover of the owner the difference in value between the two lots as damages for the agent's frauds, it not having been shown that the principal ever knew of, authorized, or ratified the fraud.

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## MAYO v. INDIA MUTUAL INSURANCE COMPANY.

[162 MASSACHUSETTS, 172.]

**MARINE INSURANCE.** — INSURANCE AGAINST "TOTAL LOSS ONLY" COVERS CONSTRUCTIVE TOTAL LOSS.

**MARINE INSURANCE.** — INSURANCE "FREE OF PARTIAL LOSS" COVERS CONSTRUCTIVE TOTAL LOSS exceeding one half the insured value, though the property insured arrived in port *in specie* without considerable diminution in quantity.

**MARINE INSURANCE.** — WHAT IS KNOWN AS THE MEMORANDUM CLAUSE IN POLICIES OF MARINE INSURANCE, whereby the insurer is exempted from any partial loss of goods that are esteemed perishable in their nature, is intended to apply only when goods are perishable, and there is difficulty in proving whether the loss occurred from the inherent quality of the article or from the peril insured against.

**ACTION** to recover upon a policy insuring against peril of the seas, for the sum of three thousand one hundred dollars, certain "fertilizers on board schooner Luta Price, at and from Boston to St. Andrews, New Brunswick, free of partial loss." The policy contained a proviso that the insurer should not be

liable "for any partial loss on salt, grain, peas, beans, fish, fruit, whether preserved or otherwise, hides, hops, vegetables, or other goods that are esteemed perishable in their nature, or of the freight thereon, unless it amount to seven per cent on the whole aggregate value of such articles, and happen by stranding." The vessel went ashore on a ledge of rocks, but came off the ledge early the next morning, and sank in eight or nine fathoms of water, with the cargo on board. Twelve days afterwards the vessel was raised and beached near the place of stranding, the cargo being much depreciated in value, though little diminished in quantity. It was transferred to a lighter and landed at St. Andrews, at a cost of \$1,881.03. The plaintiffs declined, after notice, to remove the fertilizer or pay the duty thereon, claiming that they were entitled to recover from the insurer the full amount of the policy. The cargo was thereupon taken possession of by the customs authorities, and sold for non-payment of duties, for the sum of \$1,045.91. After deducting the expenses of transportation and of sale and the amount of the duties, there was left \$511.78 as the net proceeds of the sale. The jury found for the plaintiffs on the issue of abandonment, and the judge thereupon ordered a verdict for the plaintiffs for the amount of the policy, with interest, and reported the case by a final decision of this court.

*E. P. Carver*, for the plaintiffs.

*F. Dodge*, for the defendant.

W. ALLEN, J. The cargo, consisting entirely of fertilizer, arrived at the port of discharge *in specie*, almost undiminished in quantity, and of substantial though greatly diminished value. If the risk continued to that time, there was not a total loss: *Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371. The plaintiffs' contention is, that the risk had been terminated by a constructive total loss and abandonment. It was agreed that there had been a loss from the perils insured against of over fifty per cent of the value of the cargo, and the jury found that the cargo had been abandoned by the plaintiffs to the underwriters on account of the loss. It is not denied that these facts would show a total loss under a general insurance, but it is claimed that the insertion in the policy, in the case at bar, of the words "free of partial loss" changes the character of a total loss under the policy, so that there can be no

recovery for a constructive total loss, but only for the actual total destruction of the thing insured.

It was decided in *Hobbs v. Eagle Ins. Co.*, 10 Gray, 131, 69 Am. Dec. 308, that an insurance upon a ship against "total loss only" covered a constructive total loss. The same decision was made in regard to an insurance against total loss only on a vessel and outfits in *Greene v. Pacific Mut. Ins. Co.*, 9 Allen, 217. In *Burnham v. Boston Marine Ins. Co.*, 133 Mass. 399, it was held that there was a constructive total loss of "advances" insured free from average by the constructive total loss of the catch of a fishing vessel. *Mottell v. Alliance Ins. Co.*, 10 Gray, 144, is very much like the case at bar. There part of a cargo consisting of tin plates was insured, "partial loss excepted." Chief Justice Shaw says: "We can have no doubt that by the true construction of this clause the insurers were not to be liable for loss on tin plates, unless such loss, estimated according to the rules and usages of Boston, should amount to a total loss. . . . What, then, is the extent of this exception? The natural construction is, that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature. The clause in the contract gives no intimation that it is any particular kind of total loss, whether absolute or technical; it simply excludes all kind of liability for a partial loss. By the natural construction of these provisions, it would seem that if the goods insured were placed by one of the perils insured against in that situation in which the assured has a right to abandon, and he does abandon, he has sustained a total loss, not within the exception." This case is cited in *Pierce v. Columbian Ins. Co.*, 14 Allen, 320, where Mr. Justice Gray says: "And by the American law, if goods other than memorandum articles are injured by perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery against the insurers."

It is argued that the fertilizer insured should be treated as if included in the common memorandum clause, and that memorandum articles are not subject to constructive total loss and abandonment. We cannot admit either proposition. The distinction between tin plates and memorandum articles

was considered in *Kettell v. Alliance Ins. Co.*, 10 Gray, 144. The common memorandum clause, by which certain enumerated and described goods are made free from average unless general, or the ship be stranded, has been in use for nearly 150 years, and is intended to apply to goods of a perishable nature, and to meet the difficulty of proving whether a loss accrued from the inherent quality of the article, or from a peril insured against. It is printed into the policy in suit, in these words: "Nor for any partial loss on salt, grain, peas, beans, fish, fruit, whether preserved or otherwise, hides, hops, vegetables, or other goods that are esteemed perishable in their own nature, or on the freight thereon, unless it amounts to seven per cent on the whole aggregate value of such articles, and happen by stranding." As *Kettell v. Alliance Ins. Co.*, 10 Gray, 144, is directly in point, there is no occasion for considering whether a different rule will be applied to articles of a perishable nature included in the common memorandum clause, and whether such articles are liable to constructive total loss and abandonment. In England there seems to be no difference between memorandum articles and other goods in that respect: *Roux v. Salvador*, 3 Bing. N. C. 266; *Rosetto v. Gurney*, 11 Com. B. 176; *Anderson v. Royal Exchange Assurance Co.*, 7 East, 38; *Davy v. Milford*, 15 East, 559; *Adams v. Mackenzie*, 13 Com. B., N. S., 442; *De Mattos v. Saunders*, L. R. 7 Com. P. 570.

Whether in this commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge *in specie*, or whether a special rule will apply to such articles, and there may be a constructive total loss and abandonment of them, if, as may have been the fact in the case at bar, the damage is such that the expense of landing and restoring the goods will equal or exceed their actual value, or whether the general rule in regard to other cargo will apply, and damage to the amount of one half of the insured value, with abandonment, will constitute a total loss, we express no opinion: See *Marcoardier v. Chesapeake Ins. Co.*, 8 Cranch, 39; *Moreau v. United States Ins. Co.*, 1 Wheat. 219; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204; 4 Am. Rep. 664; *Peole v. Protection Ins. Co.*, 14 Conn. 47.

Judgment on the verdict.

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MARINE INSURANCE—TOTAL AND PARTIAL LOSS.—An injury to more than half the value of the vessel when repaired will constitute a technical total loss: *Dickey v. American Ins. Co.*, 3 Wend. 658; 20 Am. Dec. 763; AM. ST. REP., Vol. XXIII.—52

*Orrock v. Commonwealth Ins. Co.*, 21 Pick. 456; 32 Am. Dec. 271, and note 279, 280. An insurer of a ship under a policy against "total loss only," even if a time policy, may recover for a constructive total loss: *Heebner v. Eagle Ins. Co.*, 10 Gray, 131; 69 Am. Dec. 308, and note. Compare *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204; 4 Am. Rep. 664.

**MARINE INSURANCE — TOTAL AND PARTIAL LOSS, IN RESPECT TO MEMORANDUM ARTICLES.** — Where articles are included in a memorandum as perishable, they must be completely destroyed before the insured can recover as for a total loss: *Maggarth v. Church*, 1 Caines, 196; 2 Am. Dec. 173, and note 179, 180.

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## CARLTON v. BLAKE.

[152 MASSACHUSETTS, 176.]

**PARTY-WALLS.** — If one who has built two houses having a common wall between them afterwards conveys them to different persons by conveyances in which each parcel is described as terminating at a line which is in fact in the center of the wall, though the wall is not mentioned, such conveyances put upon each wall the burden and the privilege of a party-wall.

*S. W. Harmon*, for the plaintiff.

*G. A. Blaney*, for the defendant.

**W. ALLEN, J.** When the houses were built, the legal title to the land was in the city of Boston. They were built as houses in a block, by one Sperry, who held contracts from the city of Boston to convey them to him, or to his appointee or appointees. After the houses were built, they were conveyed to different owners by the city of Boston, at the request of Sperry. The descriptions in the deeds were the same as in the contracts respectively. One provision in each was, that the building erected on the lot should be of the width of the front of the lot, and should cover the whole front of the lot, and in the deed it was recited that the building already erected thereon conformed to the conditions. There is nothing in the contract or deed in relation to party or division walls.

When Sperry built the houses, he did not build a separate wall for each house on the line between the lots, but one wall for both houses, one half of which was upon each lot, and this was a party-wall. When he, by the city of Boston, conveyed each house, he conveyed it by a description of the lot passing through the center of the party-wall, and by necessary implication he conveyed the party-wall. The severance of the ownership of the two houses, of each of which

the wall formed a part, put upon each the burden and the privilege of a party-wall. There is an implied grant of a party-wall in the house conveyed when the line is run by courses and distances through the middle of the wall of both houses, as well as when it is described as running through the middle of such wall. It is the actual existence of the wall as a part of both houses, and not the reference to it as a monument, from which the grant and reservation are implied. As regards the wall, it is immaterial whether the buildings are conveyed under the description of the lots or by designation as buildings.

The case cannot be distinguished from *Everett v. Edwards*, 149 Mass. 588; 14 Am. St. Rep. 462; *Richards v. Rose*, 9 Ex. 218; and *Rogers v. Sinsheimer*, 50 N. Y. 646.

The wall being a party-wall, the defendant had a right to build it up as he did: *Everett v. Edwards*, 149 Mass. 588; 14 Am. St. Rep. 462.

Decree affirmed.

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**PARTY-WALL — DEFINITION.** — Party-wall ordinarily means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall by the parties: *Harber v. Evans*, 101 Mo. 661; 20 Am. St. Rep. 646, and note; *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60, and note. A wall between two buildings of adjoining owners, used as a common wall for twenty years, becomes a party-wall, whether equally upon the lot of each or wholly upon the lot of one owner: *McVey v. Durkin*, 136 Pa. St. 418.

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## MEAGHER v. HAYES.

[152 MASSACHUSETTS, 228.]

**MORTGAGE — IF A BUILDING IS PUT UPON MORTGAGED LAND BY THE CONSENT OF THE MORTGAGOR**, and without the consent of the mortgagee, it becomes a part of the realty and is covered by the mortgage, and this result cannot be averted by any agreement to which the mortgagee is not a party. One who purchases the property at a sale under the mortgage acquires title to the building, though notified at the sale of the claims of another thereto.

**BILL** in equity to enjoin the removal of a building which was situated upon lands mortgaged by Bryan & Fitzgerald. The building was, by its owner, Hayes, moved on this land under an agreement with Bryan that it should remain personal property, and be removable. Hayes sold the building to Russell, with whom Bryan also agreed that the building should continue to be personal property; and thereafter Rus-

sell sold the building to James Commons. The mortgage was foreclosed under a power contained therein, and sold to the plaintiff, Meagher, who was notified, at the time of sale, of Russell's claim of ownership to the building. The judge ruled that the plaintiff was entitled to recover.

*H. Kingman*, for the defendant Commons.

*J. A. Maxwell and J. P. Barlow*, for the plaintiff.

**W. ALLEN, J.** The building put upon the land by the consent of the mortgagor, and without the consent of the mortgagee, was clearly, as regards him and the mortgagee, a part of the realty, and covered by the mortgage: *Builer v. Page*, 7 Met. 40; 39 Am. Dec. 757; *Cole v. Stewart*, 11 Cush. 181; *Guernsey v. Wilson*, 134 Mass. 482. The foreclosure of the mortgage was by sale, and the right of the mortgagee to sell the building as part of the mortgaged property could not be affected by agreements in regard to it to which he was not a party, nor by notice of the claims of the defendants given to one who buys the house at the sale: *Clary v. Owen*, 15 Gray, 522; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542.

Decree affirmed.

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**FIXTURES — WHAT ARE, ON MORTGAGED PROPERTY.** — Whatever is placed on realty subject to a mortgage, by a mortgagor or those claiming under him, becomes a part of the realty, and is therefore subject to the mortgage: *Hopewell Mills v. Taunton etc. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and note. Fixtures attached to the realty after the execution of a mortgage may properly be sold by the mortgage creditor: *Dutro v. Kennedy*, 9 Mont. 101. *Contra*, see *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889, and note; *Carpenter v. Allen*, 150 Mass. 361.

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## COMMONWEALTH v. MANCHESTER.

[182 MASSACHUSETTS, 289.]

**FISHERIES.** — EACH NATION HAS THE RIGHT TO CONTROL FISHERIES on the open sea within a marine league from the coast, and within bays wholly within its territory the headlands of which are not more than two marine leagues apart.

**JURISDICTION — INTERNATIONAL LAW — FISHERIES.** — As between nations, the minimum limit of the territorial jurisdiction of each over tide-waters is a marine league from its coast, and all bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and each nation has a right to control fisheries within this limit, whether the fish be migratory, free-swimming fish, or free-moving, like lobsters, or fish attached to or imbedded in the soil.



**JURISDICTION OF STATES OVER FISHERIES IN SEAS AND BAYS ADJACENT TO THEIR COASTS OR WITHIN THEIR TERRITORY** extends to the same distance as the jurisdiction of the nation over such seas and bays. Hence each state may regulate the fisheries within such limits, subject only to such powers as Congress may exercise in the regulation of commerce, foreign or domestic.

**JURISDICTION — FISHERIES. — THE REGULATION OF FISHERIES WITHIN THE TERRITORIAL LIMITS OF A STATE** is not a regulation of commerce, and the control of such fisheries is not included in the grant to Congress of the power to regulate commerce.

**TIDE-WATERS AND FISHERIES. —** Each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running. Each state has the right to appropriate the tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.

**JURISDICTION OF ADMIRALTY AND OF STATE COURTS. —** The grant of judicial power to the United States, in cases of admiralty and marine jurisdiction, does not affect the jurisdiction nor the legislative power of the states over so much of their territory as lies within the limits of the state, though it may be a part of a sea or bay. Therefore, the legislature may provide regulations respecting fisheries within the state, and authorize its courts to try and punish persons who violate such regulations, provided such fisheries are within a marine league of the coast or are within a bay the mouth of which is not more than two leagues in width.

**DEFENDANT** was convicted on the charge of drawing, setting, stretching, and using a purse-seine for the taking of fish in the waters of Buzzard's Bay, within the jurisdiction of the commonwealth. The evidence in support of the conviction tended to show that the defendant and other citizens of Rhode Island constituted the officers and crew of the fishing steamer A. T. Serrell, and that the place where they were apprehended and where they were engaged in violating the statute was about a mile and a quarter from a point on the shore midway from the north line of Falmouth to the south line thereof, and within Buzzard's Bay. The distance between the headlands at the mouth of Buzzard's Bay was more than one and less than two marine leagues, and the distance across the bay at the point where the offense was committed was more than two marine leagues. The evidence on behalf of the defendant tended to show that objects could not be discerned from one headland to another at the mouth of the bay, and that the steamer was duly enrolled and licensed at Newport, Rhode Island, under the laws of the United States for carrying on the menhaden fishery.

*G. A. King and J. F. Jackson*, for the defendant.

*H. C. Bliss*, first assistant attorney-general, for the commonwealth.

FIELD, C. J. The defendant was complained of for taking fish by the use of a purse-seine in the waters of Buzzard's Bay, within the jurisdiction of this commonwealth. It appears by the report that the point in Buzzard's Bay where the seine was used "was within that part of Buzzard's Bay which the harbor and land commissioners, acting under the provisions of section 2 of chapter 196 of the acts of the year 1881, had, so far as they were capable of doing so, assigned to and made a part of the town of Falmouth"; that the distance between the headlands at the mouth of Buzzard's Bay is "more than one and less than two marine leagues"; and that "the distance across said bay at the point where the acts of the defendant were done is more than two marine leagues, and the opposite points are in different counties." The place "was about, and not exceeding, one mile and a quarter from a point on the shore midway from the north line of the town of Falmouth to the south line" of said town. Buzzard's Bay lies wholly within the territory of Massachusetts, having Barnstable County on the one side, and the counties of Bristol and Plymouth on the other. The defendant offered evidence that he was fishing for menhaden only, with a purse-seine, and that the bottom of the sea "was not encroached upon or disturbed"; and that "it was impossible to discern objects across from one headland to the other at the mouth of Buzzard's Bay"; that he was a citizen of the state of Rhode Island, and that the vessel upon which he was employed, and in connection with which he was using the seine, belonged to Newport, in that state, and had been "duly enrolled and licensed at that port under the laws of the United States for carrying on the menhaden fishery."

It was contended at the trial, among other things, that the statute of 1886, c. 192, under which the complaint was made, had not repealed the statute of 1865, c. 212; but this has not been argued in this court. It is plain that the statute of 1886, c. 192, was intended to regulate the whole subject of using nets or seines for taking fish in the waters of Buzzard's Bay, and that by implication it repealed the statute of 1865, c. 212, so far as that statute related to the taking of menhaden by the use of a purse-seine in the waters of

that bay. The principal question argued here is, whether the place where the acts of the defendant were done was within the jurisdiction of the commonwealth of Massachusetts.

The Public Statutes, c. 1, secs. 1, 2, are as follows: "Sec. 1: The territorial limits of this commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other is equivalent to the shore line. Sec. 2: The sovereignty and jurisdiction of the commonwealth extend to all places within the boundaries thereof, subject to the rights of concurrent jurisdiction granted over places ceded to the United States." The Public Statutes, c. 22, sec. 1, contain the following provision: "The boundaries of counties bordering on the sea shall extend to the line of the commonwealth as defined in section 1 of chapter 1." Section 11 of the same chapter is as follows: "The jurisdiction of counties separated by waters within the jurisdiction of the commonwealth shall be concurrent upon and over such waters." The statute of 1881, c. 196, which has been referred to, is as follows: "Sec. 1: The boundaries of cities and towns bordering upon the sea shall extend to the line of the commonwealth as the same is defined in section 1 of chapter 1 of the General Statutes. Sec. 2: The harbor and land commissioners shall locate and define the courses of the boundary lines between adjacent cities and towns bordering upon the sea, and upon arms of the sea, from high-water mark outward to the line of the commonwealth, as defined in said section 1, so that the same shall conform as nearly as may be to the course of the boundary lines between said adjacent cities and towns on the land; and they shall file a report of their doings, with suitable plans and exhibits, showing the boundary lines of any town by them located and defined, in the registry of deeds in which deeds of real estate situated in such town are required to be recorded, and also in the office of the secretary of the commonwealth." Sections 1 and 2 of chapter 1 of the General Statutes contain the provisions which have been before recited, as now contained in the Public Statutes, c. 1, secs. 1, 2, and c. 22, secs. 1, 11. These provisions were first enacted by the Statutes of 1859, c. 289. Section 1 of the Revised Statutes, c. 1, was as follows: "The sovereignty and jurisdiction of the commonwealth extend to all places within the boundaries thereof,

subject only to such rights of concurrent jurisdiction as have been or may be granted over any places ceded by the commonwealth to the United States." The boundaries of the commonwealth on the sea were first exactly defined by the statute of 1859, c. 289. The boundaries of the territory granted by the charter of the colony of New Plymouth, or of the territory included in the province charter, need not be particularly set forth. Buzzard's Bay was undoubtedly within the territory described in those charters.

By the definitive treaty of peace between the United States of America and Great Britain, "his Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, . . . to be free, sovereign, and independent states; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof": 8 U. S. Stats. at Large, 81. If Massachusetts had become an independent nation, there can be no doubt, we think, that her boundaries on the sea, as she has defined them by the statutes, would be acknowledged by all foreign nations, and that her right to control the fisheries within these boundaries would be conceded. It has often been a matter of controversy how far a nation has a right to control the fisheries on its sea-coast, and in the bays and arms of the sea within its territory; but the limits of this right have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. More extensive rights in these respects have been and are now claimed by some nations, but, so far as we are aware, all nations concede to each other the right to control the fisheries within a marine league of the coast, and in bays within the territory the headlands of which are not more than two marine leagues apart.

In the proceedings of the Halifax commission, under the treaty of Washington of May 8, 1871, where it was for the interests of the United States to claim against Great Britain, independently of treaties, as extensive rights of fishing as could be maintained, the claim was stated, in the answer on behalf of the United States, as follows: "It becomes necessary at the outset to inquire what rights American fishermen, and

those of other nations, possess, independently of treaty, upon the ground that the sea is the common property of all mankind. For the purposes of fishing, the territorial waters of every country along the sea-coast extend three miles from low-water mark; and beyond is the open ocean, free to all. In the case of bays and gulfs, such only are territorial waters as do not exceed six miles in width at the mouth, upon a straight line measured from headland to headland. All larger bodies of water connected with the open sea form a part of it. And whenever the mouth of a bay, gulf, or inlet exceeds the maximum width of six miles at its mouth, and so loses the character of territorial or inland waters, the jurisdictional or proprietary line for the purpose of excluding foreigners from fishing is measured along the shore of the bay according to its sinuosities, and the limit of exclusion is three miles from low-water mark": Docs. & Procs. Hal. Com. (Wash., 1878), vol. 1, p. 120 (45th Cong., 2d Sess., H. R. Ex. Doc., No. 89). The government of Canada had been instructed by the government of Great Britain, on April 12, 1866, "that American fishermen should not be interfered with, either by notice or otherwise, unless found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839"; but afterwards the British government issued instructions "that the United States fishermen will not be for the present prevented from fishing, except within three miles of land, or in bays which are less than six miles broad at the mouth": Vol. 1, pp. 120, 121. It is true that Mr. Dana, of counsel for the United States, contended, in argument with reference to the right to fish in the open sea, "that the deep-sea fisherman, pursuing the free-swimming fish of the ocean with his net or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser, though he approach within three miles of a coast, by any established recognized law of all nations": Vol. 2, p. 1654. This contention, however, did not touch the right to fish in bays or arms of the sea, and it was not the claim actually made by the United States before the commission. This is stated in the answer and in the brief of the United States. The answer does not allude to any such position as that taken by Mr. Dana in his closing argument, but in the brief it is said: "Many authorities maintain that whenever, under

the law of nations, any part of the sea is free for navigation, it is likewise free for fishing by those who sail over its surface. But without insisting upon this position, the inevitable conclusion is, that prior to the treaty of Washington the fishermen of the United States, as well as those of all other nations, could rightfully fish in the open sea more than three miles from the coast, and could also fish at the same distance from the shore in all bays more than six miles in width, measured in a straight line from headland to headland": Vol. 1, p. 166.

The counsel for the defendant in the case at bar place much reliance upon the decision in *The Queen v. Keyn*, 2 Ex. Div. 63. In that case, the defendant was the officer in command of the *Franconia*, a German steamer, which, at a point "one mile and nine tenths of a mile south-southeast from Dover pier-head, and within two and a half miles from Dover beach," in the English Channel, ran down and sank the British steamer *Strathclyde*, and one of the *Strathclyde*'s passengers was drowned. The defendant was indicted in the central criminal court for manslaughter. The question was, whether the offense was committed within the jurisdiction of the admiralty, the central criminal court having jurisdiction to hear and determine any offense alleged "to have been committed on the high seas or other places within the jurisdiction of the admiralty of England": Page 100. A majority of the court held that the offense was committed on the German steamer, and not on the British steamer; and that, under the laws then existing, there was no admiralty jurisdiction over an offense committed by a foreigner on a foreign ship on the open sea, whether within or without a marine league from the shore of England. In consequence of this decision, Parliament passed the statute of 41 & 42 Vict., c. 373. By that act it was declared that, "for the purpose of any offense declared by this act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of her Majesty's dominions."

It is obvious that by this decision the court did not attempt to define the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only the extent of the existing admiralty jurisdiction over offenses committed on the open sea. The courts of England would undoubtedly enforce any act of Parliament conferring upon them jurisdiction over offenses committed anywhere. It is equally obvious that the

decision has nothing to do with the right of control over fisheries in the open sea, or in bays or arms of the sea. The case contains a great deal of learning upon the respective limits of the common-law jurisdiction and of the admiralty jurisdiction in England over crimes, and upon the boundaries of counties in England under the laws then existing. These distinctions are immaterial in the case at bar, except with reference to the contention that the place where the acts complained of were done was within the admiralty jurisdiction of the courts of the United States. The boundaries of counties in Massachusetts may be defined by statute, and they may be made to extend over all the territory of Massachusetts, whether it be sea or land; and if Massachusetts has a right to control the fisheries in Buzzard's Bay, offenses in violation of the regulations which the state may establish can be tried in any of its courts upon which it may confer jurisdiction. It is to be noticed, however, that in all the citations contained in the different opinions given in *The Queen v. Keyn*, 2 Ex. Div. 63, wherever the question of the right of fishery is referred to, it is conceded that the control, to the extent at least of a marine league, belongs to the nation on whose coast the fisheries are. The argument of Mr. Benjamin, of counsel for the defendant, is not contained in the report of the case; but from the statement of Mr. Justice Lindley, found on page 90 of the report, it seems that he admitted that the dominion of a state over the seas adjoining its shore existed for the purpose of protecting "its coasts from the effects of hostilities between other nations which may be at war, the protection of its revenue and of its fisheries, and the preservation of order by its police."

In *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394, it became necessary for the privy council to determine whether a point in Conception Bay, Newfoundland, more than three miles from the shore, was a part of the territory of Newfoundland, and within the jurisdiction of its legislature. It appeared that the average width of the bay "is about fifteen miles," and the distance between the headlands is "rather more than twenty miles." Lord Blackburn, in delivering the opinion, says, at page 416: "The question raised in this case, and to which their lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay, above described. The few English common-law authorities on this point relate to the question as to where the

boundary of counties ends, and the exclusive jurisdiction at common law of the court of admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore." He quotes, at page 417, the well-known language of Lord Hale: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner," and comments upon its indefiniteness; and then cites the case of *Regina v. Cunningham*, Bell's C. C. 72, 86, and says, at page 419, that in this case "this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain." Apparently he was of opinion that, by most of the text-writers on international law, Conception Bay would be excluded from the territory of Newfoundland, and the part of the Bristol Channel which in *Regina v. Cunningham*, Bell's C. C. 72, 86, was decided to be in the county of Glamorgan would be excluded from the territory of Great Britain; but he decides that Conception Bay is a part of the territory of Newfoundland, because the British government has exercised exclusive dominion over it, with the acquiescence of other nations, and it has been declared by act of Parliament "to be part of the British territory, and part of the country made subject to the legislature of Newfoundland."

We regard it as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast, and that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish like lobsters, or fish attached to or imbedded in the soil. The open sea within this limit is of course subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the pre-



vention of frauds on the revenue, exercise an authority beyond this limit. We have no doubt that the British crown will claim the ownership of the soil in the bays and in the open sea adjacent to the coast of Great Britain, to at least this extent, whenever there is any occasion to determine the ownership. The authorities are collected in Gould on Waters, pt. 1, c. 1, 2, and notes. See also *Neill v. Duke of Devonshire*, 3 App. Cas. 135; *Gammell v. Commissioners of Woods and Forests*, 3 Macq. 419; *Mowat v. McFee*, 5 Sup. Ct. Canada, 66; *The Queen v. Cubitt*, 22 Q. B. Div. 622; Stats. 46 & 47 Vict., c. 22.

But it is argued that if the fisheries of Buzzard's Bay are within the control of either the state of Massachusetts or of the United States, this control, by the constitution of the United States, is exclusively with the United States. The question is, therefore, whether the statutes of Massachusetts which have been cited are repugnant to the constitution and laws of the United States. There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the states. It is conceded that the case of *Dunham v. Lamphere*, 3 Gray, 268, is decisive of the case at bar, if that case was correctly decided. That case was decided before the passage of the statute of 1859, c. 289, and the place where the acts complained of were done was not within a bay, but in the sea within one mile of Gravel Island. Shaw, C. J., says, in the opinion (pp. 269, 270): "Being within a mile of the shore puts it beyond doubt that it was within the territorial limits of the state, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, that these limits extend a marine league, or three geographical miles, from the shore; and in ascertaining the line of shore, this limit does not follow each narrow inlet or arm of the sea; but when the inlet is so narrow that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet." He then proceeds to discuss the question "whether the right of property and of dominion and government over the sea-coast fisheries, and all fisheries in tide-waters and arms of the sea, belong properly to the general government, or remain with the state government"; and he concludes that "in the distribution of powers between the general and state governments . . . the

right to the fisheries, and the power to regulate the use of the fisheries on the coasts and in the tide-waters of the state," were left by the constitution of the United States with the states, "subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic"; and he says "that the exercise of both of these are not inconsistent, and therefore not in conflict with each other, was also settled by the supreme court of the United States in the case of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245." In *Dunham v. Lamphere*, 3 Gray, 268, the defendant was a citizen of the state of Rhode Island, and the owner and master of a fishing vessel which had been duly licensed as a fishing vessel pursuant to the laws of the United States; but it is said that this license did not affect the question.

We are asked to reconsider that decision mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion. It has indeed been suggested that the recent decisions of the supreme court of the United States upon the power of Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (U. S. Const., art. 1, sec. 8), require that this decision be reconsidered; but no recent decisions of that court have been cited which relate to the regulation and control of the fisheries within the territorial tide-waters of a state, and the decisions of that court which relate to this subject are considered hereafter, and they do not appear to be in conflict with the decision in *Dunham v. Lamphere*, 3 Gray, 268. So far as we know, it has never been decided anywhere that the regulation of the fisheries within the territorial limits of a state is a regulation of commerce; the decisions are, that the control of the fisheries is not included in the grant of power to Congress to regulate commerce. In all treaties and international relations, the subject of coast fisheries is regarded as distinct from that of commerce. The argument addressed to us is, that by the constitution of the United States the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction": U. S. Const., art. 3, sec. 2; that this power is exclusive; that the case at bar is within this jurisdiction, and that therefore the courts of Massachusetts have no jurisdiction over it. It must, we think, be considered as settled that if land on the coast be reclaimed from the sea, or if piers or wharves be extended into the sea, such land and

structures are a part of the territory of the state whose shores they adjoin: *Pollard v. Hagan*, 3 How. 212; *Weber v. Harbor Comm'rs*, 18 Wall. 57; *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Roxbury*, 9 Gray, 451; *Boston v. Richardson*, 105 Mass. 351; *Galveston v. Menard*, 23 Tex. 349; *Barney v. Keokuk*, 94 U. S. 324.

In *McCready v. Virginia*, 94 U. S. 391, it is said in the opinion: "The precise question to be determined in this case is, whether the state of Virginia can prohibit the citizens of other states from planting oysters in Ware River, a stream in that state, where the tide ebbs and flows, when its own citizens have that privilege. The principle has long been settled in this court that each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away: *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 436; *Weber v. Harbor Commissioners*, 18 Wall. 66. In like manner, the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty: *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes, not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

In *Smith v. Maryland*, 18 How. 71, 74, every question was discussed which arises in the case at bar except the question whether the place where the acts of the present defendant were done was within the territory of Massachusetts. In that case the plaintiff in error was a citizen of Pennsylvania, and owner of a sloop licensed to be employed in the coasting trade and fisheries, which was seized by the sheriff of Anne

Arundel County, in Maryland, while engaged in dredging for oysters in Chesapeake Bay, in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that state. The questions presented and argued were, whether that statute was repugnant to those provisions of the constitution of the United States which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or which declare that the citizens of each state "shall be entitled to all privileges and immunities of citizens in the several states": U. S. Const., art. 4, sec. 2. Mr. Justice Curtis, in delivering the opinion, says: "Whatever soil below low-water mark is the subject of exclusive property and ownership belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence: *Pollard's Lessee v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *Den v. Jersey Co*, 15 How. 426. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish." He also says that the statute of Maryland does "not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong; and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the state of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the state to its own citizens, or a part of them, or by force of the constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the state holds this soil, or its power to define and control that trust,—are matters wholly without the scope of this case, and upon which we give no opinion." Upon the question of the admiralty jurisdiction, he says: "But we consider it to have been settled by this court, in *United States v. Bevens*, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction nor the legislative power of the

states ever so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the constitution." He also held that it was not repugnant to the clause of the constitution which conferred upon Congress the power to regulate commerce, and that the enrollment and license of the vessel conferred upon the plaintiff in error no right to violate the statute of Maryland. It is said in the opinion: "No question was made in the court below whether the place in question be within the territory of the state. The law is, in terms, limited to the waters of the state." The question, therefore, did not arise "whether a voyage of a vessel licensed and enrolled for the coasting trade had been interrupted by force of a law of a state while on the high seas, and out of the territorial jurisdiction of such state." The dimensions of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is "twelve miles across at the ocean": 1 Bishop's Crim. Law, 7th ed., sec. 105. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the state of Maryland, although at the point where Anne Arundel County bounds upon it the bay is wholly within that state: See *Haney v. Compton*, 36 N. J. L. 507; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Weston v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764; *Mahler v. Norwich and New York Trans. Co.*, 35 N. Y. 352; *United States v. Smiley*, 6 Saw. 640.

The argument from the grant of judicial power to the United States in all cases of admiralty and maritime jurisdiction proceeds upon the theory that the jurisdiction thus granted is the jurisdiction as to subject-matter and place which courts of admiralty exercised in England when the constitution was adopted, and that this is an exclusive jurisdiction, civil and criminal, which is fixed and cannot be changed by legislation. But in civil causes the jurisdiction both as to subject-matter and place is not exactly that of the courts of admiralty of England at any time; and this jurisdiction can within certain limits be changed by Congress, and under the existing laws personal suits on maritime contracts or for maritime torts can be maintained in the state courts; and the courts of

the United States, merely by virtue of this grant of judicial power, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States; and these statutes, so far as they have been passed under the grant of admiralty and maritime jurisdiction, for the punishment of offenses committed on the high seas, or in bays and arms of the sea, have usually been confined to offenses committed "out of the jurisdiction of any particular state": U. S. Rev. Stats., sec 5339; *Butler v. Boston and Savannah S. S. Co.*, 130 U. S. 527; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *Leon v. Galceron*, 11 Wall. 185; *Steamboat Co. v. Chase*, 16 Wall. 522; *Chase v. American Steamboat Co.*, 9 R. I. 419; 11 Am. Rep. 274; *Schoonmaker v. Gilmore*, 102 U. S. 118; *Insurance Co. v. Dunham*, 11 Wall. 1; *Ex parte Byers*, 32 Fed. Rep. 404.

In each of the cases of *United States v. Bevans*, 8 Wheat. 336, and of *Commonwealth v. Peters*, 12 Met. 387, the place where the offense was committed was in Boston harbor; and it was held to be within the jurisdiction of Massachusetts, according to the meaning of the statutes of the United States which punished certain offenses committed upon the high seas, or in any river, haven, basin, or bay "out of the jurisdiction of any particular state." The test applied in *Commonwealth v. Peters*, 12 Met. 387, which was decided in the year 1847, was, that the place was within a bay "not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side," and was therefore within the body of a county. In *United States v. Bevans*, 8 Wheat. 336, Marshall, C. J., said: "The jurisdiction of a state is co-extensive with its territory,—co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States."

There are no statutes of the United States which, as we construe them, purport to regulate the menhaden fisheries on the coast or within the bays of Massachusetts. The rights granted to British subjects by the treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the statute of Massachusetts (Stat. 1886, c. 192) was passed which the defendant is charged with violating. If the place where the offense charged in this case was committed is within the general jurisdiction of Massa-

achusetts, then, according to the principles declared in *Smith v. Maryland*, 18 How. 74, the statute in question is not repugnant to the constitution and laws of the United States. The contention is, that the jurisdiction of a state as between it and the United States must be confined to the body of counties; and that counties must be defined according to the customary English usage at the time of the adoption of the constitution of the United States; and that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such, or such parts, were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye.

We are unable to find any indication anywhere that the customary law of England in regard to the boundaries of counties was adopted by the constitution of the United States as a measure to determine the territorial jurisdiction of the states. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control over this territory has been granted to the United States, this control remains with the state. In *United States v. Bevans*, 3 Wheat. 336, Marshall, C. J., in the opinion, asks the following questions: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?" "As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water where the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts?" It would be a startling proposition that all persons who step into tide-water on the open coast of Massachusetts are, while they remain there, wholly beyond the jurisdiction of the state. The statutes of the United States define and punish but few offenses on the high seas, and unless other offenses, when committed in the sea near the coast, can be punished by the states, there is a large immunity from punishment for acts which ought to be punishable as criminal. There are reasons, perhaps, why the states should not exercise, in all respects, the same authority over the open sea near the shore as over bays within their limits; and Congress or the courts of the United States might refuse to recognize the right of a state, by statute, to extend its territorial limits beyond what is generally recog-

nized as the territorial limits of states by the law of nations. Within these limits, we think a state can define its boundaries on the sea, and the boundaries of its counties, and by this test the commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.

The statutes of Massachusetts, in regard to bays at least, make definite boundaries which, before the passage of the statutes, were somewhat indefinite; and if it were necessary so to consider the statutes, they might well be taken to be a definition of the distance which a person can see, although the origin and history of the statutes have no connection with the English law concerning the boundaries of counties. It is to be noticed that Rhode Island and some other states have passed similar statutes defining their boundaries: R. I. Pub. Stats. 1882, c. 1, secs. 1, 2; c. 3, sec. 6; Gould on Waters, sec. 16, and note. The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited: *Commonwealth v. King*, 150 Mass. 221; but we have no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which seem to us to relate to the menhaden fisheries within such a bay. The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters "within the jurisdiction of this commonwealth"; and it was passed, we think, for the preservation of the fish, and it makes no discrimination in favor of citizens of Massachusetts and against citizens of other states. If there be a liberty of fishing for swimming fish in the navigable waters of the United States, common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a state may well be permitted to regulate within its territory, certainly in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the constitution and the laws of the United States. We see no error in the rulings at the trial, and there must be judgment on the verdict.

So ordered.



THE PRINCIPAL CASE was removed to the supreme court of the United States by a writ of error, and thereupon the latter court affirmed the judgment of the state court upon reasoning substantially identical with that shown in the opinion in the principal case: See *Manchester v. Massachusetts*, 139 U. S. 240. After stating the facts of the case, and referring to the statutes of Massachusetts under which the conviction had taken place, the supreme court of the United States said: "We think it must be regarded as established, that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war, or for the prevention of frauds on their revenue, exercise an authority beyond this limit: Gould on Waters, pt. 1, c. 1, secs. 1-17, and notes; *Neill v. Duke of Devonshire*, 8 App. Cas. 135; *Gannell v. Commissioners*, 3 Macq. 419; *Mowatt v. McFee*, 5 Sup. Ct. Canada, 66; *The Queen v. Cullett*, 22 Q. B. Div. 622; *State*, 46 & 47 Vict., c. 22. It is further insisted by the plaintiff in error that the control of the fisheries of Buzzard's Bay is, by the constitution of the United States, exclusively with the United States, and that the statute of Massachusetts is repugnant to that constitution and to the laws of the United States. In *Dunkum v. Lamphere*, 3 Gray, 268, it was held (Chief Justice Shaw delivering the opinion of the court) that in the distribution of powers between the general and state governments, the right to the fisheries, and the power to regulate the fisheries on the coasts and in the tide-waters of the state, were left, by the constitution of the United States, with the states, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic. In the present case, the court below was asked to reconsider that decision, mainly on the ground that the admiralty and maritime jurisdiction of the courts of the United States was not considered in the opinion, and that the recent decisions of the supreme court of the United States, on the power of Congress to regulate commerce, required that the decision be reconsidered; but the court stated that no recent decisions of this court had been cited which related to the regulation of fisheries within the territorial tide-waters of a state, and that the decisions of this court which related to that subject did not appear to be in conflict with the decision in *Dunkum v. Lamphere*, 3 Gray, 268, and that it never had been decided anywhere that the regulation of the fisheries within the territorial limits of a state was a regulation of commerce. It is further contended that by the constitution of the United States the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and is exclusive; that this case is within such jurisdiction; and that therefore the courts of Massachusetts have no jurisdiction over it. In *McCready v. Virginia*, 94 U. S. 391, the question involved was, whether the state of Virginia could prohibit the citizens of other states from planting oysters in Ware River, a stream in Virginia, where the tide ebbed and flowed, when her own citizens had that privilege. In that case it was said that the principle had long been settled in this court, that each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away; and that in like manner the states own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while

running; and this court added in its opinion: 'The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.'

"In *Smith v. Maryland*, 18 How. 71, 74, a vessel licensed to be employed in the coasting trade and fisheries was seized by the sheriff of Anne Arundel County, in Maryland, while engaged in dredging for oysters in Chesapeake Bay in violation of a statute of Maryland enacted for the purpose of preventing the destruction of oysters in the waters of that state; and the questions presented were, whether that statute was repugnant to the provisions of the constitution of the United States which grant to Congress the power to regulate commerce, or to those which declare that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, or to those which declare that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Mr. Justice Curtis, in delivering the opinion of this court, said: 'Whatever soil below low-water mark is the subject of exclusive property and ownership belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence: *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *Den v. The Jersey Co.*, 15 How. 426. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish.' He also said that the statute of Maryland does 'not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the state of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the state to its own citizens or a part of them, or by force of the constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the state holds this soil, or its power to define and control that trust, — are matters wholly without the scope of this case, and upon which we give no opinion.' Upon the question of the admiralty jurisdiction he said: 'But we consider it to have been settled by this court, in *United States v. Bevana*, 3 Wheat. 336, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the states over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress,

nor with any law of Congress whatever, we are of opinion it is not repugnant to this clause of the constitution.' The court also held that the act was not repugnant to the clause of the constitution which conferred upon Congress the power to regulate commerce, and that the enrollment and license of the vessel gave to the plaintiff in error no right to violate the statute of Maryland. It is said in the opinion that 'no question was made in the court below whether the place in question be within the territory of the state. The law is, in terms, limited to the waters of the state'; and the question, therefore, did not arise 'whether a voyage of a vessel licensed and enrolled for the coasting trade had been interrupted by force of a law of a state while on the high seas, and out of the territorial jurisdiction of such state.' The dimensions of Chesapeake Bay do not appear in the report of the case, but it has been said that this bay is 'twelve miles across at the ocean': 1 Bishop's Crim. Law, sec. 105. It is a bay considerably larger than Buzzard's Bay, and is not wholly within the state of Maryland, although at the point where Anne Arundel County bounds upon it it is wholly in that state: *Haney v. Compton*, 36 N. J. L. 507; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Weston v. Sampson*, 8 Cush. 347; 54 Am. Dec. 764; *Mahler v. Norwich and New York Transportation Co.*, 35 N. Y. 352; *United States v. Smiley*, 6 Saw. 640.

"In the case of *Stockton v. Baltimore etc. R. R. Co.*, 32 Fed. Rep. 9, in the circuit court for the district of New Jersey, Mr. Justice Bradley shows clearly that there is no necessary conflict between the right of the state to regulate the fisheries in a given locality, and the right of the United States to regulate commerce and navigation in the same locality. He says that prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, and after the conquest, those lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery. He adds: 'It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators. . . . The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams. . . . So wide and extensive is the operation of this power, that no state can place any obstruction in or upon any navigable waters against the will of Congress.' The doctrine has always been firmly maintained by this court, that whenever a conflict arises between a state and the United States, as to the regulation of commerce or navigation, the authority of the latter is supreme and controlling. Under the grant by the constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contracts or for maritime torts can be maintained in the state courts; and the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States: *Butler v. Boston and Savannah S. S. Co.*, 130 U. S. 527; *The Belfast*, 7 Wall. 624; *The Eagle*, 8 Wall. 15; *Leon v. Galeoran*, 11 Wall. 185; *Steamboat Co. v. Chase*, 16 Wall. 522; *Chase v. American Steamboat Co.*, 9 R. I. 419; 11 Am. Rep. 274; *Schoonmaker v. Gilmore*, 102 U. S. 118; *Insurance Co. v. Dunham*, 11 Wall. 1; *Jones v. United States*, 137 U. S. 202, 211.

"In each of the cases of *United States v. Bevans*, 3 Wheat. 336, and of *Commonwealth v. Peters*, 12 Met. 387, the place where the offense was committed was in Boston Harbor; and it was held to be within the jurisdiction of Massa-

achusetts, according to the meaning of the statutes of the United States which punished certain offenses committed upon the high seas, or in any river, haven, basin, or bay 'out of the jurisdiction of any particular state.' The test applied in *Commonwealth v. Peters*, 12 Met. 367, which was decided in the year 1847, was that the place was within a bay 'not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side,' and was therefore within the body of a county. In *United States v. Bevans*, 3 Wheat. 336, Marshall, C. J., said: 'The jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.' If the place where the offense charged in this case was committed is within the general jurisdiction of Massachusetts, then, according to the principles declared in *Smith v. Maryland*, 18 How. 71, 74, the statute in question is not repugnant to the constitution and laws of the United States. It is also contended that the jurisdiction of a state as between it and the United States must be confined to the body of counties; that counties must be defined according to the customary English usage at the time of the adoption of the constitution of the United States; that by this usage counties were bounded by the margin of the open sea; and that, as to bays and arms of the sea extending into the land, only such, or such parts, were included in counties as were so narrow that objects could be distinctly seen from one shore to the other by the naked eye. But there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the constitution of the United States as a measure to determine the territorial jurisdiction of the states. The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and except so far as any right of control over this territory has been granted to the United States, this control remains with the state. In *United States v. Bevans*, 3 Wheat. 336, Marshall, C. J., in the opinion, asks the following questions: 'Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? As the powers of the respective governments now stand, if two citizens of Massachusetts step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts?'

"The statutes of the United States define and punish but few offenses on the high seas, and unless other offenses when committed in the sea near the coast can be punished by the states, there is a large immunity from punishment for acts which ought to be punishable as criminal. Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; and by this test the commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties. The statutes of Massachusetts, in regard to bays at least, make definite boundaries, which, before the passage of the statutes, were somewhat indefinite; and Rhode Island and some other states have passed similar statutes defining their boundaries: Pub. Stat. R. I., 1892, c. 1, secs. 1, 2; c. 3, sec. 6; Gould on Waters, sec. 16, and note. The waters of Buzzard's Bay are, of course, navigable waters of the United States, and the jurisdiction of Massachusetts over them is necessarily limited: *Commonwealth v. King*, 160 Mass. 221; but there is no occasion to consider the power of the United States to regulate or control, either by treaty or

legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay. The rights granted to British subjects by the treaties of June 5, 1854, and May 8, 1871, to take fish upon the shores of the United States, had expired before the statute of Massachusetts (Stat. 1886, c. 192) was passed which the defendant is charged with violating. The fish commission was instituted 'for the protection and preservation of the food-fishes of the coast of the United States.' Title 51 of the Revised Statutes relates solely to food-fisheries, and so does the act of 1887. Nor are we referred to any decision which holds that the other acts of Congress alluded to apply to fisheries for menhaden, which is found as a fact in this case not to be a food-fish, and to be only valuable for the purpose of bait and of manufacture into fish-oil. The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters 'within the jurisdiction of this commonwealth'; and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts, and against citizens of other states. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the constitution and the laws of the United States. It may be observed that section 4386 of the Revised Statutes (a re-enactment of section 4 of the joint resolution of February 3, 1871) provides as follows in regard to the commissioner of fish and fisheries: 'The commissioner may take, or cause to be taken, at all times, in the waters of the sea-coast of the United States where the tide ebbs and flows, and also in the waters of the lakes, such fish, or specimens thereof, as may, in his judgment, from time to time, be needful or proper for the conduct of his duties, any law, custom, or usage of any state to the contrary notwithstanding.' This enactment may not improperly be construed as suggesting that, as against the law of a state, the fish commissioner might not otherwise have the right to take fish in places covered by the state law. The pertinent observation may be made that as Congress does not assert, by legislation, a right to control pilots in the bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of that matter to the states (*Cooley v. Board of Wardens*, 12 How. 299), so if it does not assert, by affirmative legislation, its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the state which contains such bays. We do not consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the state in the absence of the affirmative action of Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the state."

## CASEY v. SMITH.

[152 MASSACHUSETTS, 294.]

**CHILD, CONTRIBUTORY NEGLIGENCE OF PERSON IN CHARGE OF.** — If a child is too young to be capable of taking care of himself, it is the duty of his proper custodian to care for him; and in an action to recover for injuries caused by the negligence of another, if his custodian was guilty of negligence, that negligence is imputed to the child.

**CONTRIBUTORY NEGLIGENCE.** — If the parents of a child three years of age permit him to go upon a crowded public street attended by no one but his brother and sister, aged respectively seven years and nine months, and five years and fourteen days, for the purpose of meeting his father, fifty minutes before the latter is expected to return, and the child is run over wholly or partly through his failure to exercise such care as an adult person of ordinary prudence would have exercised under like circumstances, the injuries must be imputed to the negligence of the parents, and no recovery can be had therefor.

**ACTION** to recover for injuries caused to the plaintiff by his being run over by a vehicle on B Street, in South Boston. The jury returned a verdict in favor of the defendant.

*J. A. McGeough*, for the plaintiff.

*C. T. Gallagher*, for the defendant.

**KNOWLTON, J.** The plaintiff, at the time of the accident, was three years and nineteen days old. He was run over on a public street in a crowded part of the city of Boston, and the jury have found, in substance, that the accident was caused, wholly or in part, by his failure to exercise such care as an adult person of ordinary prudence would have exercised under like circumstances. That fact would not prevent his recovery, if he was of such age and intelligence that he could properly be alone on the street, and if he used the ordinary care of boys of his age; but if he was too young to take care of himself, and was negligently permitted to be on the street, and if he was hurt when an adult in his place would not have been, the negligence whereby he came there would be held to have contributed to the accident. In such a case, his presence there would be a cause, and not merely a condition, of the accident. If a child is too young to be capable of caring for himself, it is the duty of his proper custodian to care for him; and in a suit to recover for an injury caused by the negligence of another, if his custodian was guilty of negligence, that negligence is imputed to him: *Lynch v. Smith*, 104 Mass. 52, 57; 6 Am. Rep. 188; *Gibbons v. Williams*, 185 Mass. 333, 335; *Collins v. South Boston R. R.*,

142 Mass. 301, 314; 56 Am. Rep. 675. In the present case, the judge ruled, in effect, that the plaintiff was too young to be capable of taking care of himself on a street crowded with vehicles, and that his mother, who was his proper custodian, was negligent in allowing him to be there at the time of the accident.

His mother voluntarily permitted him to go upon the street attended by no one but his brother, seven years and nine months old, and his sister, five years and fourteen days old. It was on the thirteenth day of March, and the weather was clear and cold. She lived on Bolton Street, a narrow street with narrow sidewalks, about forty-five feet from the corner of B Street, which is about twenty-five or thirty feet wide between the curbstones, and has sidewalks about eight feet wide. She let the three children go out at about twenty minutes past five o'clock in the afternoon, to await their father's coming home from work. Their father testified that he was accustomed to come home from his work by way of B Street, at about ten minutes past six o'clock, and that he had frequently met his children waiting for him on B Street or Bolton Street, and that he and the plaintiff's mother knew that B Street, "at this time of the day, was usually crowded with teams of various kinds." The question presented by the exceptions is, whether, on these facts, which were all undisputed, the jury could properly have been permitted to find that the plaintiff's mother was in the exercise of due care in allowing him to go upon the street. It is to be noted that he went out with his brother and sister fifty minutes before his father was expected to return. His mother must be presumed to have known the disposition and habits of children, and to have expected that they would occupy themselves for nearly an hour on the street as children would naturally do. What she did was equivalent to telling them to go out and play on the street until their father should come home. It was very different from a direction to them to go together to a designated place, and after doing an errand, directly to return. She knew they must occupy themselves in some way for fifty minutes, and that they were to be upon a street crowded with teams. It cannot be argued that the girl, five years old, could assist in the care of the plaintiff. Her presence would increase rather than diminish the probability of accident. There could have been no reasonable ground for expecting that the older boy, for so long a time, would exer-

cise the constant and efficient supervision and control of the plaintiff which would be necessary reasonably to secure his safety in such a place. If the two older children had the plaintiff by the hand when they left the house, and if they might have been trusted to go in that way if sent on an errand a little distance along the street, the mother must have known that, if sent out to pass their time for an hour, each would soon insist upon having freedom of movement.

The case differs materially from all those cited by the plaintiff's counsel, and a majority of the court are of opinion that there was no evidence that the mother of the plaintiff was in the exercise of due care in permitting him to go on the street for so long a time without making better provision to secure his safety.

Exceptions overruled.

**NEGLIGENCE — PARENT AND CHILD.** — In an action for negligent injury to an infant, brought by a parent for the latter's benefit, the contributory negligence of the parent is a bar to the action, except when the injury to the child was committed wantonly, willfully, or recklessly: *Westbrook v. Mobile etc. R. R. Co.*, 68 Miss. 560; 14 Am. St. Rep. 587, and note. Compare also *Wynore v. Mahaska County*, 28 Iowa, 396; 16 Am. St. Rep. 649; *Winters v. Kansas City C. R'y Co.*, 90 Mo. 509; 17 Am. St. Rep. 591; *Pratt etc. Co. v. Brawley*, 83 Ala. 371; 3 Am. St. Rep. 751, and note. A child of very tender years cannot be guilty of contributory negligence; and the weight of authority seems to maintain the rule that the negligence of parents cannot be imputed to such a child, when recovery is sought on behalf of the child, and not that of the parents: *Shippy v. An Soble*, 33 Mich. 280.

## BROWN v. HOLYOKE WATER POWER COMPANY.

[112 MASSACHUSETTS, 682.]

**LANDLORD AND TENANT — EVICTION.** — If a room and power are let together in one contract, and the right to have the power furnished through a belt is appurtenant to the room, the throwing off of the belt by the landlord, and keeping it off with a view to stopping the tenant's business and compelling him to vacate the room, is an eviction entitling him to recover such damages as he suffered thereby.

**TENANT AT WILL MAY RECOVER DAMAGES ON HIS LANDLORDS** resulting from his unlawful eviction by the latter, though the tenancy might have been terminated in a short time by proper proceedings therefor.

*T. B. O'Donnell*, for the plaintiffs.

*G. Wells, W. W. McClench, and J. Barnes*, for the defendant.

**KNOWLTON, J.** The plaintiffs hired of the defendant a room in which were shafting and a pulley connected by a belt with



another part of the defendant's premises, in such a way as to furnish power — which we infer to have been water-power — for the running of machinery in the room hired by the plaintiffs. The room and power were let together in one contract, and the report indicates that the room was so situated in reference to the source of power, and so connected with it, that the right to have the power which would be furnished through the belt in the ordinary way was appurtenant to the plaintiffs' room, which by the contract of the parties was treated as a part of the premises let. Without having terminated the plaintiffs' tenancy, the defendant threw off the belt, and kept it off, with a view to stop the plaintiffs' business, and to oblige them to vacate the room. This was a breach of the defendant's implied contract for quiet enjoyment, and an eviction of the plaintiffs from an important part of the premises let, which entitle them to recover such damages as they suffered from the defendant's unlawful act: *Dexter v. Manley*, 4 Cush. 14; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522. The tenancy at will might have been terminated in a short time by proper proceedings; but until it was terminated, the plaintiffs could not lawfully be deprived of the enjoyment of any part of the premises hired.

Verdict set aside.

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LANDLORD AND TENANT — EVICTION — WHAT CONSTITUTES. — The neglect of the landlord to keep the premises in a condition suitable to the purposes for which it was rented may be treated as an eviction, by the tenant, and he may refuse to pay rent: *Alger v. Kennedy*, 49 Vt. 169; 24 Am. Rep. 117. As to what acts of a landlord constitute an eviction, see extended note to *De Witt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 62. A tenant should be held evicted when the act of the landlord is of such a character as to deprive the tenant of the beneficial use and enjoyment of the leased premises: *Pidgeon v. Excelsior Boat Club*, 66 Mich. 326; *Conlon v. McGraw*, 66 Mich. 194; *Tallman v. Murphy*, 120 N. Y. 348; *Leonard v. Armstrong*, 73 Mich. 577.

by a stone post one foot wide was the entrance, of about the same dimensions and construction, which led up to the hallway of which we have already spoken. Its threshold was at the same height as that of the elevator entrance, and was a continuation of it, but not quite so wide. The elevator entrance was provided with an up and down sliding door, which when down closed the entrance, and with a chain, which when hooked hung loosely across it. On the evening when the accident occurred, the elevator doorway was open and the chain unhooked. It was quite dark, about half-past six o'clock, in January, and the night was foggy. There was no light on the outside of the building, although there was a gas light at a distance of about sixty feet, and an electric light at a distance of 120 feet. The sidewalk in front of the building did not extend in front either of the elevator entrance or of the entrance to No. 619, the intervening space being flagged even with the street so that teams could back up to both these entrances. Upon this state of facts, there was evidence of a want of due care in leaving the elevator entrance thus exposed, and the plaintiff's testimony tended to show that, while seeking to enter at No. 619, he stepped into the elevator entrance and was precipitated down the well. He had a right to suppose that, when seeking to enter where he had a right to go, he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and uninclosed by any barrier at a time when it was not in use. Without any light directly upon it, with the door open directly upon the elevator-well, with the chain unhooked, it might certainly be held by a jury that there was a carelessness in its management which would expose any one to serious danger who was lawfully approaching the entrance to the hallway. There was also evidence that for this condition of things the defendants were responsible. While their tenants had the authority to use this elevator, it was the defendants' duty to see that, while not in use, it was in a safe condition for those who were passing in the street or lawfully seeking access to their building. They furnished the power by which the elevator was run, although the tenants used it for freight purposes during the day. But the defendants' servant, the watchman, was, in the language of the report, "supposed to shut the elevator at six o'clock at night." By this we understand that it was his duty so to do, and on the night of the accident he was at the

building before the accident happened. It was thus apparently by the neglect of their own servant that the elevator entrance was in the exposed condition in which it was found. While the defendants permitted their tenants to use the elevator during the day, they had not let it to them nor relinquished to them the control of it. They had not let the whole of their building, but were themselves in occupation of the part that was not let, and, so far as appears, had full authority to make the well safe.

It is said by the defendants that the opening into which the plaintiff fell was not on the premises let to Mellish, Byfield, & Co., and that there can be no liability on their part for an injury which did not arise from any defect either of the leased premises or of premises over which the tenants had the right of inviting customers, so that, even if they would be liable to the plaintiff for an injury if he had received it in the hallway by a defect existing there, they are not liable for an injury incurred by reason of negligence in the management of any opening not on the leased premises. This is to limit the liability of the defendants quite too narrowly. If the defendants had induced or invited, through their tenants, the plaintiff to enter at No. 619 Albany Street, so far as the access thereto was under their own control, it was their duty to see that this access was not endangered by their negligence in the management of the other parts of their building, in order that a person rightfully seeking to enter should not be exposed to the liability of a fall into an opening so constructed that it might well be mistaken for the proper entrance: *Elliott v. Pray*, 10 Allen, 378, 385; 87 Am. Dec. 658; *Larus v. Farron Hotel Co.*, 116 Mass. 67; *Readman v. Conway*, 126 Mass. 374.

There remains the question whether the plaintiff offered any sufficient evidence of due care. He knew the character and description of the premises; he had passed them many times, and was aware that the two entrances were close to each other; but his previous knowledge of their dangerous proximity is not conclusive that he was not exercising due care in attempting to enter: *Looney v. McLean*, 129 Mass. 38; 37 Am. Rep. 295. He described the care with which he moved, his feeling his way, his effort to ascertain when he stepped upon the threshold that he was in the right entrance. To some extent he might suppose that at that hour either the chain would be across or the door closed at the elevator entrance, and putting his knee and hand forward, discovered

neither. The character of his conduct, depending upon this and other circumstances, is such that it is not possible to say, as matter of law, that, viewed in the light of common knowledge or experience, he was lacking in due care: *Wheeler v. Boston etc. R. R. Co.*, 105 Mass. 203.

We are therefore of opinion that the learned judge who presided was in error in withdrawing the case from the jury, and that the questions of fact involved should have been submitted to their experience and judgment.

Case to stand for trial.

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**LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR NEGLIGENCE IN REPAIR OF PREMISES.** — The landlord is liable in damages to one injured by falling through opening in sidewalk left open by the janitor in his employ: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459, and note. A landlord is liable to a third person who is lawfully using his premises and is injured by the negligence of the landlord in not keeping it in repair: *Deley v. Savage*, 145 Mass. 38; 1 Am. St. Rep. 429, and extended note containing numerous cases discussing this subject; *Ingalls v. Adams Express Co.*, 44 Minn. 128.

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## MILLER v. HORTON.

[152 MASSACHUSETTS, 540.]

**STATUTORY CONSTRUCTION.** — If certain commissioners, "in all cases of farcy or glanders, having condemned an animal infected therewith," are directed by statute to cause it to be killed, they are not authorized to kill an animal not infected by the disease; and its owner, in an action to recover damages for killing it, is at liberty to prove that it did not have the disease on account of which it was condemned.

**CONSTITUTIONAL LAW — NUISANCES.** — While the legislature may declare horses infected with glanders to be nuisances, and authorize them to be killed without compensation to their owners, it cannot make the decision of an *ex parte* board conclusive that a horse is diseased, and deprive its owner of the right to be heard, and to have a trial by jury upon the question whether or not it was infected with the disease specified in the statute.

*J. Brown*, for the plaintiff.

*H. J. Fuller*, for the defendants.

**HOLMES, J.** This is an action of tort for killing the plaintiff's horse. The defendants admit the killing, but justify as members of the board of health of the town of Rehoboth, under an order addressed to the board and signed by two of the three commissioners on contagious diseases among domestic animals, appointed under the statute of 1885, chapter 378,

and acting under the alleged authority of the statute of 1887; chapter 252, section 13. This order declared that it was adjudged that the horse had the glanders, and that it was condemned, and directed the defendants to cause it to be killed. The judge before whom the case was tried found that the horse had not the glanders, but declined to rule that the defendants had failed to make out their justification, and found for the defendants. The plaintiff excepted.

The language of the material part of section 13 of the act of 1887 is: "In all cases of farcy or glanders, the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof." Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is, whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it, in a subsequent suit by the owner for compensation.

The main ground for reading into the statute an intent to make the commissioners' order an absolute protection is, that there is no provision for compensation to the owner in this class of cases; and therefore, unless the order is a protection, those who carry it out will do so at their peril. Such a construction, when once known, would be apt to destroy the efficiency of the clause, as few people could be found to carry out orders on these terms.

On the other hand, this same absence of any provision for compensation to the owner, even if not plainly founded on the assumption that only a worthless thing and a nuisance is in question, still would be an equally strong argument for keeping to the literal and narrower interpretation. If the legislature had had in mind the possible destruction of healthy horses, there was no reason in the world why it should not have provided for paying the owners. Section 12 does provide for paying them in all cases where they are not in fault, unless this is an exception. When, as here, the horse not only is not to be paid for, but may be condemned without appeal, and killed without giving the owner a hearing, or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. If the commissioners

had felt any doubt, they could have had the horse appraised under section 12. Whether an action would have lain in that case we need not consider.

The reasons for this construction seem decisive to a majority of the court, when they consider the grave questions which would arise as to the constitutionality of the clause if it were construed the other way.

Section 18 of the act of 1887, by implication, declares horses with the glanders to be nuisances, and we assume in favor of the defendant that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is, whether, if the owner of the horse denies that his horse falls within the class declared to be so, the legislature can make the *ex parte* decision of a board like this conclusive upon him. That question is answered by the decision in *Fisher v. McGirr*, 1 Gray, 1; 61 Am. Dec. 381. It is decided there that the owner has a right to be heard, and further, that only a trial by jury satisfies the provision of article 12 of the Declaration of Rights, that no subject shall be deprived of his property but by the judgment of his peers or the law of the land.

In *Belcher v. Farrar*, 8 Allen, 325, 328, it was said: "It would violate one of the fundamental principles of justice to deprive a party absolutely of the free use and enjoyment of his estate under an allegation that the purpose to which it was appropriated, or the mode of its occupation, was injurious to the health and comfort of others, and created a nuisance, without giving the owner an opportunity to appear and disprove the allegation, and protect his property from the restraint to which it was proposed to subject it." See also *Sawyer v. State Board of Health*, 125 Mass. 182; *Winthrop v. Farrar*, 11 Allen, 398. Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may

leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them.

An illustration, although not strictly an instance, of the former mode may be found in the statute authorizing firewards or engineers of fire departments to order houses to be pulled down in order to prevent the spreading of a fire, and making the town answerable to the house-owner, except in certain cases in which the house is practically worthless because it would have been burned if it had not been destroyed: Pub. Stats., c. 35, secs. 3-5. No doubt the order would be conclusive in its legislative capacity, or "so far as the res is concerned," as is said in *Salem v. Eastern R. R. Co.*, 98 Mass. 431, 449; 96 Am. Dec. 650; that is to say, that the house should be pulled down. But the owner is preserved his right to a hearing in a subsequent proceeding for compensation. On the other hand, a case where a party proceeds at his peril is, when he pulls down a house for the same object without the authority of statute. It is said that if the destruction is necessary he is not liable. But by the common law as understood in this commonwealth, "if there be no necessity, then the individuals who do the act shall be responsible": Shaw, C. J., in *Taylor v. Plymouth*, 8 Met. 462, 465; *Philadelphia v. Scott*, 81 Pa. St. 80, 87; 22 Am. Rep. 738. See *Mitchell v. Harmony*, 18 How. 115, 134, 135. This means that the determination of the individual is subject to revision by a jury in an action, and is not conclusive on the owner of the house.

So in *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94, where it was held that a statute might constitutionally authorize the killing of unlicensed dogs as nuisances, it was assumed, at page 143, that the question whether the particular dog killed was unlicensed was open in an action against the officer who killed it, and that if he killed a licensed dog he would be liable in tort; in other words, that he proceeded in that respect at his own risk; citing Shaw, C. J., in *Tower v. Tower*, 18 Pick. 262. It could have made no difference in that case if a board of three had been required to decide *ex parte* beforehand whether the dog was licensed.

In *Salem v. Eastern R. R. Co.*, 98 Mass. 431, it was decided, in agreement with the views which we have expressed, that the decision of a board of health that a nuisance existed on certain premises, and the order of the board that it be removed at the expense of the owner, were not conclusive upon the owner in a subsequent action against him to recover the

expense, he having had no notice or opportunity to be heard. The general rule is, that a judgment *in rem*, even when rendered by a regularly constituted court after the fullest and most formal trial, is not conclusive of the facts on which it proceeds against persons not entitled to be heard and not heard in fact, although, if the court has jurisdiction, the judgment does change or establish the *status* it deals with, as against all the world, from the necessities of the case, and frequently by express legislation: *Brigham v. Fayerweather*, 140 Mass. 411, 413.

It is true that it is said in *Salem v. Eastern R. R. Co.*, 98 Mass. 431, that the board's determination of questions of discretion and judgment in the discharge of their duties would protect all those employed to carry such determinations into effect. The remark is *obiter*, and it is doubtful, perhaps, on reading the whole case, whether it means that the determination would protect them in an action for damages, when the statute provides no compensation for property taken which is not a nuisance. To give it such an effect as a judgment merely would be inconsistent with the point decided, and with *Brigham v. Fayerweather*, 140 Mass. 411, 413. We are not prepared to admit that a condemnation by the present board, under section 13, could be made conclusive, in the present action, of the fact that the plaintiff's horse had the glanders. See, further, *Holcomb v. Moore*, 4 Allen, 529; *Foley v. Haverhill*, 144 Mass. 352, 354.

But we are led by the *dictum* in *Salem v. Eastern R. R. Co.*, 98 Mass. 431, to consider another possible suggestion. It may be said, suppose that the decision of the board is not conclusive that the plaintiff's horse had the glanders, still the legislature may consider that self-protection requires the immediate killing of all horses which a competent board deem infected, whether they are so or not; and if so, the innocent horses that are killed are a sacrifice to necessary self-protection, and need not be paid for.

In *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, it was held that all imported rags might be required to be put through a disinfecting process at the expense of the owner. Of course the order did not mean that the legislature or board of health declared all imported rags to be infected, but simply that the danger was too great to risk an attempt at discrimination. If the legislature could throw the burden on owners of innocent rags in that case, why could it



not throw the burden on the owners of innocent horses in this? If it could order all rags to be disinfected, why might it not have ordered such rags to be disinfected as a board of three should determine, summarily, and without notice or appeal? The latter provision would have been more favorable to owners, as they would have had a chance, at least, of escaping the burden, and it would stand on the same ground as the severer law.

The answer, or a part of it, is this: Whether the motives of the legislature are the same or not in the two cases supposed, it declares different things to be dangerous and nuisances, unless disinfected. In the one, it declares all imported rags to be so; in the other, only all infected rags. Within limits, it may thus enlarge or diminish the number of things to be deemed nuisances by the law, and courts cannot inquire why it includes certain property, and whether the motive was to avoid an investigation. But wherever it draws the line, an owner has a right to a hearing on the question whether his property falls within it, and this right is not destroyed by the fact that the line might have been drawn so differently as unquestionably to include that property. Thus, in the first case, the owner has a right to try the question whether his rags were imported; in the second, whether they were infected. His right is no more met in the second case by the fact that the legislature might have made the inquiry immaterial, by requiring all imported rags to be disinfected, than it would be in the first by the suggestion that possibly the legislature might require all rags to be put through the same process, whether imported or not. But if the property is admitted to fall within the line, there is nothing to try, provided the line drawn is a valid one under the police power. All that *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, decided was, that the line there considered was a valid one.

Still, it may be asked, if self-protection required the act, why should not the owner bear the loss? It may be answered, that self-protection does not require all that is believed to be necessary to that end, nor even all that reasonably is believed to be necessary to that end. It only requires what is actually necessary. It would seem doubtful, at least, whether actual necessity ought not to be the limit when the question arises under the constitution between the public and an individual. Such seems to be the law as between private parties in this commonwealth in the case of fires, as we have seen. It

could not be assumed as a general principle, without discussion, that even necessity would exonerate a party from civil liability for a loss inflicted knowingly upon an innocent person, who neither by his person nor by his property threatens any harm to the defendant. It has been thought by great lawyers that a man cannot shift his misfortunes upon his neighbor's shoulders in that way when it is a question of damages, although his act may be one for which he would not be punished: *Gilbert v. Stone*, Aleyn, 35; *Style*, 72; *Scott v. Shepherd*, 2 W. Black. 892, 896. See *Fairbanks v. Snow*, 145 Mass. 153, 155; 1 Am. St. Rep. 446. Upon this we express no opinion. It is enough to say that in this case actual necessity required the destruction only of infected horses, and that was all that the legislature purported to authorize.

Again, there is a pretty important difference of degree, at least (*Rideout v. Knox*, 148 Mass. 368, 372, 12 Am. St. Rep. 560), between regulating the precautions to be taken in keeping property, especially property sought to be brought into the state, and ordering its destruction. We cannot admit that the legislature has an unlimited right to destroy property without compensation, on the ground that destruction is not an appropriation to public use within article 10 of the Declaration of Rights. When a healthy horse is killed by a public officer acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use, as truly as if it were seized to drag an artillery-wagon. The public equally appropriate it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation: *Watertown v. Mayo*, 109 Mass. 315, 319; 12 Am. Rep. 694; *In re Jacobs*, 98 N. Y. 98, 109; 50 Am. Rep. 636. It does not attempt to do so. As we have said, it only declares certain diseased animals to be nuisances. And even if we assume that it could authorize some trifling amount of innocent property to be destroyed as a necessary means to the abatement of a nuisance, still, if in this section 13 it had added, in terms, that such healthy animals as should be killed by mistake for diseased ones should not be paid for, we should deem it a serious question whether such a provision could be upheld. See, further, *Hutton v. Camden*, 39 N. J. L. 122; *Hale v. Lawrence*, 21 N. J. L. 714; *Grant v. United States*, 1 Ct. of C. L. 41; *Wiggins v. United States*, 3 Ct. of Cl. 412; *Mitchell v. Harmony*, 13 How. 115, 134.

For these reasons, the literal, and as we think the true, construction of section 13 seems to us the only safe one to adopt, and accordingly we are of opinion that the authority and jurisdiction of the commissioners to condemn the plaintiff's horse under section 18 was conditional upon its actually having the glanders. If this be so, their order would not protect the defendants in a case where the commissioners acted outside their jurisdiction: *Fisher v. McGirr*, 1 Gray, 1, 45; 61 Am. Dec. 381. The fact as to the horse having the disease was open to investigation in the present action, and on the finding that the horse did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification.

In view of our conclusion upon the main question, we have not considered whether an order signed by two members of the board, upon an examination by one, satisfies the statute, or whether cases like *Ruggles v. Nantucket*, 11 Cush. 433, and *Parsons v. Pettingell*, 11 Allen, 507, apply.

Exceptions sustained.

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DEVENS, KNOWLTON, and C. ALLEN, JJ., dissented from the opinion of the majority of the court, and united in an opinion written by Judge Devens. This latter opinion declared that the act under consideration was intended to vest, and did vest, the commissioners with power to determine whether or not animals were infected by farcy or glanders, and authorised the killing of animals, without appraisal and without compensation to their owners, when they were determined by the commissioners to be infected by either of the diseases specified in the statute. The statute, as thus construed by the minority of the court, was further declared to be constitutional, and not in violation of the provisions of the Declaration of Rights. These provisions, it was insisted, were intended to apply only to proceedings taken in the exercise of the right of eminent domain, and not in any respect to impair the right of the state to make and enforce police regulations "by virtue of which the uses of property have been limited and controlled to the pecuniary disadvantage of the owner, or even the property itself destroyed." The final conclusion of the dissenting judges was expressed as follows: "The legislature has decided that a horse infected with glanders is so dangerous to the public health, whether of other valuable domestic animals or of man, that it should be destroyed on account of its dangerous character, and should cease to be entitled to the usual protection of property. It is not an objection to this law that it has failed to provide compensation to the owner, as the animal is itself, in its view, a nuisance of serious danger to the community. It has empowered a respectable tribunal with powers similar to those of a board of health, to determine whether an animal is of the class described in the statute. The exigency of the case does not permit, at least in the opinion of the legislature, of notice, appeal, or other mode of reviewing the decision of such a tribunal. This appears to me a lawful exercise of the police power, and the decision should be held conclusive, in order that

the community may be protected, and that those intrusted with the execution of the law may safely assume the responsibilities imposed upon them. The court, therefore, in my opinion, correctly refused to rule that the statute of 1887, chapter 252, which repealed the Public Statutes, chapter 90, was unconstitutional."

**STATUTES — KILLING OF ANIMALS — NUISANCES.** — A statute which makes horses affected with glanders common nuisances, and authorizes their destruction, is within the police powers of the state: *Newark etc. Ry Co. v. Hunt*, 50 N. J. L. 308.

## JOHNSON v. WATERHOUSE.

[182 MASSACHUSETTS, 555.]

**JUDGMENT AGAINST AN INFANT DEFENDANT CANNOT PROPERLY BE RENDERED IN A CIVIL ACTION, UNLESS HE HAS A GUARDIAN who may defend in his behalf.**

**THOUGH AN INFANT DEFENDANT IS REPRESENTED AT THE TRIAL OF A CIVIL ACTION BY HIS FATHER AND MOTHER, and by counsel employed by them on his behalf, this will not render immaterial the error of the court in permitting the case to be tried when the defendant was not represented by a guardian, and a judgment against him must therefore be reversed.**

*H. K. Braley and M. G. B. Swift*, for the plaintiff in error.

*A. J. Jennings and J. S. Brayton, Jr.*, for the defendant in error.

C. ALLEN, J. The general rule is well established, that a judgment cannot properly be rendered against an infant defendant in a civil suit, unless he has a guardian who may defend the suit in his behalf; and if a judgment is so rendered, the infant is entitled to maintain a writ of error to avoid the same: *Crockett v. Drew*, 5 Gray, 399; *Swan v. Horton*, 14 Gray, 179; *Farris v. Richardson*, 6 Allen, 118; 83 Am. Dec. 618; *Mansur v. Pratt*, 101 Mass. 60; *Cassier's Case*, 139 Mass. 458.

In the present case, the plea avers that the plaintiff in error was an infant at the time of the rendering of the judgment, and had no probate guardian or legally appointed guardian *ad litem*, but was in fact represented and defended in the action by his father and mother, who were present in court at the trial, and were represented by counsel, and defended the action on his behalf. The defendant in error contends that these facts will supply the want of a guardian regularly and formally appointed, and that under these circumstances the infant is not entitled to maintain his writ of error.

Such appears to be the rule adopted in Vermont: *Priest v. Hamilton*, 2 Tyler, 50; *Wrisley v. Kenyon*, 28 Vt. 5; *Fuller v. Smith*, 49 Vt. 253. The case cited from Mississippi does not appear to us to go so far, as there a husband was authorized by statute to appear for his infant wife, so that no guardian *ad litem* for her was deemed necessary: *Frisby v. Harrison*, 30 Miss. 452. No other decision has been cited by counsel which goes so far as the Vermont cases, and, after some examination, we have found none. The practice of having a regularly appointed guardian rests on good reasons. It has been said that the duty of watching over the interests of infants in a litigation devolves, in a considerable degree, upon the court: *Bank of United States v. Ritchie*, 8 Pet. 128, 144. This duty is performed in the first instance by seeing that an infant is represented by a guardian who is suitable to protect his interests in the particular case. The father is usually a proper person to act as such guardian, but not always. There is an obvious advantage in having the fitness of the person who is to act as guardian determined in the first instance, rather than after the trial is over.

It was held in *Brown v. Severson*, 12 Heisk. 381, that where an infant's mother, who was named as his guardian in his father's will, had appeared in a suit as his guardian, and answered as such, and had been recognized by the court as guardian, the judgment should not be set aside, though no formal appointment as guardian appeared of record. In the case now before us, the infant's parents did not file an answer as his guardians, nor assume to act formally as such, and there is nothing to show that the court recognized them as his actual guardians, or acted upon the assumption that they were such. They were simply his parents. It is laid down in *Macpherson on Infants*, 353, that no legal right of parentage or of guardianship will enable any one to act for the infant without an appointment as guardian. If there is no guardian of an infant defendant, the plaintiff must bring the matter to the attention of the court, and see to it that one is appointed: *Swan v. Horton*, 14 Gray, 179; *Shipman v. Stevens*, 2 Wils. 50; *Clarke v. Gilmanton*, 12 N. H. 515; *Mason v. Denison*, 15 Wend. 64, 67. In *Letcher v. Letcher*, 2 A. K. Marsh. 158, the mother of infant defendants, who was also herself a defendant, answered for them as their guardian; but she did not appear to have been appointed to defend for them, and the

judgment against them was reversed. See also *Irons v. Crist*, 3 A. K. Marsh. 148; *Searcey v. Morgan*, 4 Bibb, 96; *Pond v. Donegky*, 18 B. Mon. 558. In *Swain v. Fidelity Ins. Co.*, 54 Pa. St. 455, an attorney appeared for an infant at the instance of his mother; but this was held to be insufficient. In *Colman v. Northcote*, 2 Hare, 147, Vice-Chancellor Wigram refused to receive the answer in equity of a married woman, who was an infant, either separately or jointly with her husband, until a guardian should have been assigned to her. The fact that there are adult defendants joined with an infant defendant, and that all appear by the same attorney, will not avail to prevent the infant from obtaining a reversal of the judgment: *Goodridge v. Ross*, 6 Met. 487; *Castledine v. Mundy*, 4 Barn. & Adol. 90; 2 Saund. 212 a, note 4. The father of an infant soldier is not entitled to his bounty money, nor to money paid for his enlisting as a substitute in the army: *Banks v. Conant*, 14 Allen, 497; *Kelly v. Sprout*, 97 Mass. 169; *Taylor v. Mechanics' Savings Bank*, 97 Mass. 345. Nor has a father, as such, a right to demand and receive a legacy to his infant child: *Miles v. Boyden*, 3 Pick. 213, 218; *Genet v. Tallmadge*, 1 Johns. Ch. 3. When an infant sues by *prochein ami*, in theory of law the *prochein ami* is appointed by the court, and his authority to act may be revoked by the court: *Guild v. Cranston*, 8 Cush. 506.

It seems to us that it is more in accordance with the general current of decisions, and with sound principles, to hold that the facts stated are insufficient to show that the plaintiff in error is bound by the judgment rendered against him. Certainly he ought not to be bound by the appearance of his father and mother for him, unless in point of fact they were suitable persons to represent him in the particular case, and to defend his interests; and the proper time for making the inquiry whether they were so is past. The original answer disclosed the fact of infancy, and the original plaintiff, the present defendant in error, might have had a guardian *ad litem* appointed by making an application to the court.

According to the practice under the statutes of this commonwealth, even where a judgment is found to have been erroneous by reason of an error in fact, the entry must be, judgment reversed: Pub. Stats., c. 187, sec. 2; *Packard v. Matthews*, 9 Gray, 311.

Judgment reversed.

INFANTS, JUDGMENTS AGAINST. — As to the validity of judgments against infants where no guardian *ad litem* was appointed, see note to *Joyce v. McAvoy*, 39 Am. Dec. 135, 136; *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 377, and note. Compare *Salter v. Salter*, 30 Ga. 176; 12 Am. St. Rep. 249; *Brown v. Downing*, 137 Pa. St. 562.

## HOOTEN v. COMERFORD.

[112 MASSACHUSETTS, 501.]

DEED — PAROL EVIDENCE TO FIX BOUNDARIES. — If the east and west boundaries of lands conveyed by a deed are therein declared to be the lands of the grantor, oral evidence is admissible to fix such boundaries by showing that when the deed was delivered the grantor pointed out four stakes to the grantee, and said that the land conveyed was between those stakes, and that subsequently the land between those stakes was inclosed by fences erected by the grantor and the grantee.

*J. Brown and R. C. Brown*, for the demandant.

*M. Reed*, for the tenant.

C. ALLEN, J. The matter in dispute was to determine Mrs. Comerford's east boundary line. The description in her deed was, "bounded northerly by a contemplated street called Snell Street, easterly by land of the grantor, southerly by land of Israel Buffington, and westerly by land of the said Augustus Chace, the grantor." It thus appears that her land was taken out of the middle of a large lot belonging to her grantor, with nothing in the deed to fix either her east or her west boundary line. The deed referred to no monuments by which the starting-points from the street or from Buffington's land could be ascertained. Under such circumstances, if bounds or monuments existed at the date of the deed which were agreed upon orally by the parties as showing the lines of the land conveyed, or were erected or fixed by the parties for that purpose soon afterwards, that is sufficient to fix the true boundaries and lines of the land conveyed. Oral evidence must necessarily be resorted to, or the deed will fail: *Crafts v. Hibbard*, 4 Met. 438, 452; *Stone v. Clark*, 1 Met. 378; 35 Am. Dec. 370; *Blaney v. Rice*, 20 Pick. 62, 64; 32 Am. Dec. 204; *Kellogg v. Smith*, 7 Cush. 375, 382; *Dodd v. Witt*, 139 Mass. 63, 66; 52 Am. Rep. 700; *Lovejoy v. Lovett*, 124 Mass. 270; *Miles v. Barrows*, 122 Mass. 579, 581; *Reed v. Proprietors of Locks and Canals*, 8 How. 274, 290.

Mrs. Comerford, at the trial, introduced testimony tending to show that, at the time of the delivery of the deed

to her, Chace, her grantor, pointed out to her four stakes, one in each corner, and told her that the land between said stakes was the land he conveyed to her; and that, by an arrangement between her and Chace, the land was inclosed by fences the following season, each building one half thereof. The building of the fence was competent as a piece of evidence. The instructions to the jury were clearly expressed, and if the facts were as contended for by Mrs. Comerford, Chace could not defeat her title by a later deed to somebody else, in which the measurement would overlap upon her land: *Blaney v. Rice*, 20 Pick. 62, 64; 32 Am. Dec. 204.

Exceptions overruled.

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**DEEDS — PAROL EVIDENCE.** — Parol evidence is not admissible to add to, contradict, or vary a deed, but is admissible to explain ambiguities therein: *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239, and note; *Bonaparte v. Carter*, 166 N. C. 534.



# CASES

IN THE

# SUPREME COURT

OF

# MISSOURI.

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## HUNDLEY v. FARRIS.

[108 MISSOURI, 78.]

**PARTNERSHIP — PRIORITY OF PARTNERSHIP CREDITORS — DISTRIBUTION OF FUNDS.** — Partnership creditors have a primary and exclusive claim upon the partnership assets of bankrupt or insolvent partners.

**PARTNERSHIP — PRIORITY OF INDIVIDUAL CREDITORS.** — Individual creditors of a partnership have the exclusive and primary right to have their debts satisfied out of the separate property of the individual partners.

**PARTNERSHIP — PRIORITY OF PARTNERSHIP CREDITORS.** — The priority of a firm creditor to be satisfied out of the firm property is not lost by dissolution of the partnership, or the death of one member of the firm; nor by a statute merely prescribing methods of procedure in case of such death; nor by a statute requiring all joint contracts to be considered as joint and several, and making provision for suit against any one or more of those liable. Such statutes confer no additional rights on partnership or on individual creditors, and do not affect or vary the equitable priorities of partnership creditors.

**PARTNERSHIP — PRIOR LIEN OF PARTNERSHIP CREDITOR — WHAT CREATES — EXCEPTION.** — It is only when the dissolution of a partnership occurs by reason of the death of a partner, or the bankruptcy of the firm, that the equitable lien of the partnership creditors attaches; and when there is no joint fund and no solvent partner, an exception to this rule arises.

*James W. Boyd and A. D. Kirk, for the appellant.*

*B. R. Vineyard, for the respondent.*

**SHERWOOD, P. J.** This cause originated in the probate court of Buchanan County, from whose judgment plaintiff appealed to the circuit court, where the cause was tried on the following agreed statement of facts: —

"That during the whole of the year 1882, and thereafter, up to the time of the death of Madison S. Farris, the said Madison S. Farris and Michael Farris were partners, doing business in the city of St. Joseph and Platte County, Missouri, under the firm name of M. S. Farris & Co.; that during the time they were so in partnership, to wit, on the first day of February, 1884, said firm borrowed from plaintiff, for use in their business as such partners, the sum of \$10,000, and gave their note in their firm name therefor, payable to plaintiff one day after date, which note is on file with the transcript from the probate court of Buchanan County, sent up in this case; that on said note there was paid, September 4, 1884, \$3,075.83, and on July 1, 1885, \$1,234.70, which said payments were made by Michael Farris, as administrator of the estate of M. S. Farris & Co., and as dividends on claims allowed by the probate court.

"Said Michael Farris, as surviving partner of said firm, was appointed and qualified as administrator of said partnership estate within one year before January 30, 1884, and the balance due on said note, no payments having been then made, was duly presented and allowed by the probate court of Buchanan County, Missouri, against said partnership estate; that John Farris was duly appointed, and qualified as administrator of the individual estate of Madison S. Farris by said probate court, and within one year after the granting of letters of administration on said individual estate, this said note was presented for allowance against said individual estate, subject to the dividend so paid; that said John Farris has already paid, of individual claims allowed against said individual estate, within said first year of his administration, other than the one in controversy, nearly all the money realized from the assets of said estate, and there is not sufficient of said assets to pay in addition, on the claim in contest, a per cent thereof equal to the per cent already paid on said other individual claims so allowed; that the individual estate is not sufficient to pay more than fifty cents on the dollar of the individual claims allowed within the first year against said individual estate, exclusive of the note or claim in contest in this suit; that the partnership assets have been about exhausted, and will not pay more than fifty per cent on partnership demands.

"The partnership estate of said M. S. Farris & Co. is not sufficient to pay more than fifty per cent of the claims al-

lowed against said partnership estate; that this claimant has received his full *pro rata* of the assets of said partnership estate, the assets of said partnership estate being fully exhausted; that said Madison S. Farris died on the — day of —, 1884."

This was all the evidence introduced or offered in the case on either side. The note mentioned in the agreed statement of facts was not read in evidence, nor is a copy of it preserved in the bill of exceptions. There were no instructions or declarations of law asked or given. The court, on the agreed statement of facts, allowed plaintiff's claim against the individual estate of Madison S. Farris, deceased, but, finding it to be a partnership debt of M. S. Farris & Co., allowed it subject to the payment in full, first, of the individual debts theretofore allowed and proved in the probate court against the individual estate of said deceased, and rendered his judgment accordingly. The case was tried at the January term, 1886, of the circuit court, and at that term motions for a new trial and in arrest were filed by the plaintiff, overruled by the court and the case appealed to this court.

Touching the principle involved in this litigation, Chancellor Kent remarks: "The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of the bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled, in equity, to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot, in equity, resort to the private and separate estate until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until

all the partnership creditors are satisfied. The basis of the general rule is, that the funds are to be liable on which the credit was given": 3 Kent's Com. 64, 65.

Judge Story announces the same rule: Story on Partnership, Bennett's ed., secs. 363, 365, 366, 377, 382.

It is well-settled law, as shown by the text-writers already mentioned, and others cited by counsel for the defendant, that partnership creditors have a primary and exclusive claim upon the partnership assets of bankrupt or insolvent partners, when the same are administered and distributed. From this admitted right sprang the corresponding exclusive right of individual creditors to the satisfaction of their debts out of the separate property of the individual partners, and until such satisfaction of such primary claim in either case, neither class of creditors is entitled to any share of the fund thus primarily devoted to the satisfaction of its own special indebtedness; the rule being, and the plain equity being, that each estate must pay its own creditors.

The great current of authority follows in this direction, and is recognized by the supreme court of the United States (*Murrill v. Neill*, 8 How. 414), and in a large majority of our sister states, as well as by the text-writers. They are collated in the brief of defendant's counsel.

A different rule was announced in England during Lord Thurlow's time; but afterwards the ancient rule was restored, as declared by his successor, Lord Loughborough, in *Ex parte Elton*, 3 Ves. 238. This is the generally prevalent rule in this country, as already stated. This rule is distinctly and with emphasis recognized and asserted by this court in *Phelps v. McNeely*, 66 Mo. 554, 27 Am. Rep. 378, where the contest was between a creditor of the firm and an individual creditor as to which one was entitled to primary satisfaction of his indebtedness out of the partnership fund, and it was held that the partnership creditor was thus entitled; that his preference was not impaired by the dissolution of the partnership, nor by the fact that a deed of trust on the firm assets had been given by the purchasing partners to secure his indebtedness to his individual creditor; and that as against the rights of the firm creditor such deed was a nullity.

This ruling, though standing alone, would be decisive of this cause; for the priority of a firm creditor to be satisfied out of the firm property would not be lost by reason of the dissolution of the partnership, or perish by reason

of the death of one member of the firm. Our statutes, looking to the classification of demands against the estate of a deceased member of a partnership, and the distribution of his estate, have no effect whatever on such priority. They were not intended to have any such effect. The well-settled equities in such cases are not to be thwarted or overthrown by mere methods of procedure such as those statutes authorize. This point has frequently been thus ruled in states possessed of statutes similar to our own: *Rodgers v. Meranda*, 7 Ohio St. 192; *Irby v. Graham*, 46 Miss. 425; *Smith v. Mallory*, 24 Ala. 628.

A different rule was at first announced in Pennsylvania by a divided court, in *Bell v. Newman*, 5 Serg. & R. 91, but the views of Judge Gibson, as expressed in that case, finally prevailed: *Black's Appeal*, 44 Pa. St. 508. See also *Level v. Farris*, 24 Mo. App. 461, where the subject is exhaustively discussed by Philips, J., and the authorities ably reviewed. Nor is the position here taken in any manner affected by our statute requiring all joint contracts to be construed as joint and several, and making provision for suit against any one or more of those liable. This was the equity rule upon the occurrence of the death of a partner long before the enactment of the statute: 3 Kent's Com. 64.

Statutes of that nature confer no additional rights on the creditors of a partnership, nor upon individual creditors. Nor do they affect or vary the equitable priorities of the partnership creditors: 2 Bates on Partnership, 828, and cases cited. Indeed, they contain not the slightest tendency or intimation that way.

The case of *Shackelford's Adm'r v. Clark*, 78 Mo. 491, is not opposed to the views here announced when rightly understood. Martin, commissioner, says expressly: "No principle in the law of partnership is better settled than that the creditors of a partnership have priority over the creditors of an individual member thereof in respect to the funds of the partnership."

But that was a case where there were no partnership assets at all, and no dissolution of the partnership in consequence of the death of one of the partners. The parties to the contract were all alive and parties to that suit. Besides, there was but one fund in that case, and no occasion arose to discuss the priorities of different persons to different funds, as in the case at bar.

Such a right as is now being considered did not and could not arise in that case, and all remarks concerning it are but otiose. It is only where the dissolution of the partnership occurs by reason of the death of a partner or the bankruptcy of the firm that the lien of the partnership creditors can arise. Story says: "The joint creditors of the partnership, while all the partners are living and solvent, can enforce no claim against the joint effects or the separate effects of the partners, except by a common action at law. It is only in cases where there is a dissolution by the death or bankruptcy of one partner that the right of the joint creditors can attach, as a quasi lien, upon the partnership effects, as a derivative, subordinate right, under and through the lien and equity of the partners": Story on Partnerships, sec. 361.

When there is no joint fund and no solvent partner, this makes an exception to the rule just mentioned: Story on Partnership, sec. 378; *Smith v. Mallory*, 24 Ala. 636, and cases cited. These considerations mark the wide difference between the present case and the one in 78 Missouri, on which the plaintiff so confidently relies.

The case of *Eaton v. Walsh*, 42 Mo. 272, has no bearing whatever on this case. This reasoning and these authorities result in an affirmance of the judgment, and it is so ordered.

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**PARTNERSHIP — PRIORITIES BETWEEN PARTNERSHIP CREDITORS AND INDIVIDUAL CREDITORS.** — Partnership creditors have superior rights and equities, with respect to firm property of an insolvent partnership, over the creditors of the individual partners: *Powers v. Large*, 69 Wis. 621; 2 Am. St. Rep. 767, and note; *Greene v. Butterworth*, 45 N. J. Eq. 738; *Pettyjohn v. Woodruff*, 86 Va. 478; *Schuster v. Rader*, 13 Col. 330; *Nimick v. Carpenter*, 125 Ill. 117; *Spratt v. First Nat. Bank*, 84 Ky. 85; *Brown v. Beecher*, 120 Pa. St. 590; *Moody v. Lucier*, 62 N. H. 585; *Hooker's Assignment*, 75 Iowa, 377; *Rothell v. Grimes*, 22 Neb. 526; *First Nat. Bank v. Brenneisen*, 97 Mo. 145; *Banks v. Steele*, 27 Neb. 138. But partnership creditors cannot resort to the separate property of the individual partners until their individual creditors have been satisfied: *Wilder v. Keeler*, 3 Paige Ch. 467; 23 Am. Dec. 781, and note; *Meady v. Lucier*, 62 N. H. 585; *Greene v. Butterworth*, 45 N. J. Eq. 738; *Olufin v. Behr*, 89 Ala. 503; unless the partnership creditors have acquired a lien by contract, in which case they must be granted the full benefit of the lien: *Spratt v. First Nat. Bank*, 84 Ky. 85. However, in *Blair v. Black*, 31 S. C. 346, 17 Am. St. Rep. 30, and note, *Alexander v. Gorman*, 15 R. I. 421, and *Pettyjohn v. Woodruff*, 86 Va. 478, the contrary rule is laid down, that individual creditors of a partner are not entitled to precedence over partnership creditors, after the latter have exhausted their remedy against the partnership assets. Compare note to *McCulloch v. Daskin*, 18 Am. Dec. 286-283, as to when a partner's separate property will be liable for partnership debts. In *Brown v. Miller*, 11 Col. 421, where the

co-partners retired from the partnership, leaving one partner sole owner of the firm property, who confessed judgment in favor of his individual creditors, no fraud being shown, it was decided that such individual creditors were entitled to the proceeds of the property in preference to the partnership creditors.

## STATE v. BITTICK.

(JOS. MISSOURI, MR.)

**MARRIAGE—DEFINITION.** — Marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex.

**MARRIAGE BY CONTRACT.** — A valid marriage exists between the parties, where a man, and a woman under eighteen years of age whose mother refuses consent to her marriage, making it impossible to procure a marriage license, mutually agree to marry, and publicly announce themselves as man and wife, and at the same time execute a written contract in the presence of witnesses, who sign the same, by which the contracting parties agree to live together as man and wife, and this is followed by cohabitation and holding themselves out publicly as husband and wife.

**MARRIAGE BY COMMON LAW NOT AFFECTED BY STATUTE.** — A statute prescribing the procurement of a marriage license, and the other formalities to be observed in the solemnization of marriage, does not render marriages entered into according to the common law, but not in conformity to such formalities, void, unless the statute itself declares them so.

*Boulware and Finley*, for the appellant.

*John M. Wood*, attorney-general, for the state.

THOMAS, J. The defendant was indicted and convicted in the Callaway circuit court for taking away Bertha A. L. Bice, a female under eighteen years of age, from Sarah Rhine, her mother, who had the legal charge of her, for the purpose of concubinage, and was sentenced to imprisonment in the penitentiary for a term of two years. From this sentence he has taken his appeal to this court. The record shows that the defendant was a widower with six children, and according to the finding of the jury, Bertha A. L. Bice was under eighteen years of age. She lived with her mother, who was a widow.

The mother testified that the girl was about sixteen years old. The girl worked at defendant's, and, it seems, fell in love with him, and she and he desired to marry; but the mother refusing to give her consent, they were unable to obtain a marriage license. Determined, however, not to be thwarted

in their designs and wishes, they got together, and F. L. Minor testified as to what then occurred, as follows: "Know Mrs. Rhine and Bertie Bittick, the wife of defendant. Bertie and defendant were married at my house about the 16th of last April; were married publicly, in the presence of over twenty persons. They married themselves. There was no minister or officer present. They stood up in the parlor floor, and mutually agreed and promised to marry each other. They publicly made known themselves as man and wife; lived, cohabited, and held themselves out to the world as man and wife. They were known and recognized by the public as man and wife. They, at the time of said marriage, signed and executed a written marriage contract, which was attested by myself and a number of others."

Witness identified the following contract as made by the parties, and witnessed by him and others:—

"MARRIAGE CONTRACT.

"We, Hiram J. Bittick and Bertie A. L. Bice, enter into a solemn vow to live together so long as we may both live, to live together as man and wife, in the presence of our God and the undersigned witnesses, at the residence of F. L. Minor, in Cote Sans Dessein township, county of Callaway, state of Missouri, on this sixteenth day of April, 1890.

"H. J. BITTICK.

"BERTHA A. L. BICE.

"Witnesses:—

"F. L. MINOR.

"W. A. JOHNSON.

"FANNIE A. JOHNSON.

"JANE T. MINOR.

"AGNES BITTICK.

"OLIVIA RIEFSTIECK.

"ROSE RIEFSTIECK.

"WILLIAM RIEFSTIECK.

"HERBERT JOHNSON.

"The above and foregoing instrument of writing was filed for record, April 29, 1890, at 10:20, A. M., and duly recorded.

"GEORGE W. PENN, Recorder.

"By P. B. BAILEY, Deputy Recorder."

This is a sufficient statement of the facts of this case to present the points involved.

Upon the facts thus given, the court gave ten instructions at the instance of the state, and seventeen at the instance of



defendant, and yet defendant complains that the court did not fully instruct the jury. The view we have taken of the case renders it unnecessary to refer to the instructions specifically. Suffice to say, that the court told the jury that the marriage ceremony and contract, as given here, did not constitute a marriage, and therefore that defendant could not escape the penalty of the statute under which he was indicted, on the ground that he had made Bertha his wife. The defendant contends that this was error, and that this ceremony and contract did constitute a valid marriage, and therefore that defendant and Bertha were, after April 16, 1890, man and wife, and had a right to cohabit together as such; and this is the point to be decided.

Owing to the importance of the question, involving as it does the best interests of society and the preservation of the home and family, the basis of all good society, we gave it a very careful consideration. This and kindred questions have been before the American and English courts so often, and the subject has been so frequently and thoroughly discussed by the courts and text-writers, that we deem it unnecessary and even a profitless task to review the authorities again in this case. Ever since 1805 we have had statutes in this state regulating the marriage ceremony, and providing who might solemnize it. These statutes remained, in substance, the same till 1881, when for the first time an act requiring a license to marry was passed. Prior to this change, the question as to whether the statutes of this state on the subject superseded the common law, and rendered a marriage not in conformity with the statutory requirements void, was before this court in 1857, in *State v. McDonald*, 25 Mo. 176; in 1876, in *Cargile v. Wood*, 63 Mo. 501; in 1877, in *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359; and again in 1883, in *State v. Gonce*, 79 Mo. 600.

Two propositions are conclusively settled in this state by the cases above cited: 1. That prior to the adoption of the statute in 1881, requiring a marriage license before any one authorized by the statute could perform the ceremony, a marriage according to the common law was valid in this state, though not in conformity to the statute; 2. In the interpretation of statutes on the subject of marriage, a common-law marriage is good, though not in conformity to the statutory requirements, unless the statutes contain express words of nullity. And we may add that this rule of interpretation

has been adopted in nearly all the American states. See Stewart on Marriage and Divorce, sec. 53, where the authorities are collated, and also 1 Bishop on Marriage and Divorce, sec. 232, as well as the cases cited in *Dyer v. Brannock*, 66 Mo. 391; 27 Am. Rep. 359.

These two propositions being settled even beyond debate, let us see if it was intended by the statute of 1882 to change or modify them, or either of them.

The first section of this act (Sess. Acts, 1881, p. 161) provides that, "previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same." The remaining provisions of the act are substantially as they had existed prior to its enactment, the changes made being such only as to make a statutory marriage conform to the theory of the license system. And the statute of 1881 was, in all essential particulars, in force in 1890, when defendant and Bertha were married, as they claim. By other sections of this act, the officer authorized to issue marriage licenses was prohibited from issuing a license authorizing the marriage of any male under twenty-one, or female under the age of eighteen years, except with the consent of his or her father, or if he is dead, etc., his or her mother, etc., and imposing penalties upon those who issue licenses or solemnize the marriage ceremony contrary to the statutory requirements. But there are no words in the act declaring a marriage not in conformity to the statute null and void. Hence, applying the rule of interpretation of marriage statutes given above to the statute in force on April 16, 1890, we see, that if the marriage of defendant and Bertha was good at common law it was not made null and void by the statute, and is therefore valid.

The only question remaining, therefore, for us to determine is, Did the contract in this case constitute a valid common-law marriage? We think it did. Our statute defines marriage thus: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." While it is here declared to be a civil contract, it is almost universally held to be something more than an ordinary contract. Marriage is a *status*, created by contract, and we formulate the definition of it as follows: Marriage is the civil *status* of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the

community, of the duties legally incumbent on those whose association is founded on the distinction of sex. The contract of marriage in this case comes up to every requirement of this definition. It created the relation of husband and wife between the defendant and Bertha, so long as they both should live. In form, then, the contract was good, and constituted a valid marriage at common law: 1 Bishop on Marriage and Divorce, secs. 2, 3.

This relation between them is indissoluble, except by death or decree of court. It is scarcely necessary for us to cite authorities that at common law a female of the age of twelve and a male of fourteen were capable of entering into a contract of marriage: 1 Bishop on Marriage and Divorce, sec. 145. There is no question that the parties in this instance were capable of assuming the marital relation, by contract, at common law. The defendant having entered into a valid marriage with Bertha A. L. Bice, and thus made her his wife, he is not guilty of the crime of taking her away from her mother for the purpose of concubinage.

We will add that we have come to this conclusion very reluctantly, for we feel that the best interests of men and women and children, of society, of the family, and the home require that parties should not "marry themselves," and that all marriages should be entered into publicly before those authorized by law to solemnize them, and put upon the public records. But we are not here to make the law conform to what we think it ought to be, but to declare it as it is. As late as 1877, this court, after a full review of all the authorities, declared that a statute prescribing the formalities to be observed in the solemnization of marriage did not render marriages entered into according to the common law, but not in conformity to such formalities, void, unless the statute itself declared them null, and that this rule of interpretation had been the rule since 1857; and yet when the statute of 1881 was enacted, the words of nullity of all marriages not in conformity to the statute were omitted. If the law-making power had desired to make common-law marriages void, all that was required was to add to the first section of the act of 1881 these words: "And all marriages entered into without a license shall be void." This was not done, and hence we must conclusively presume that it was intended that that act should be interpreted by the rule then in force, as declared by

this court. The legislature has the power to add these words at any time, but this court has no such authority.

The judgment of the lower court is reversed, and defendant discharged.

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**MARRIAGE, WHAT CONSTITUTES.**—As to what are the essentials necessary to make a valid marriage, see *Kilburn v. Kilburn*, 89 Cal. 46, *ante* p. 447, and note. In *Eliot v. Eliot*, 77 Wis. 634, it is decided that the Wisconsin statute, providing that persons of a certain age shall be capacitated to make contracts of marriage, abrogates the common-law rule in reference to the ages of consent for persons contracting marriage, even though the statute does not expressly declare that persons under the ages therein mentioned shall not be capable of contracting a marriage.

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## STATE v. EMERT.

[103 MISSOURI, 241.]

**PEDDLER—SALE OF ARTICLES MADE IN ANOTHER STATE—RIGHT TO IMPOSE LICENSE.**—One who goes from place to place in a state soliciting the sale of and selling sewing-machines, which are made by and are the property of a citizen of another state, is a peddler, from whom a license may be exacted by the state in which the machines are sold; and upon a failure to obtain such license, he is liable to the penalty imposed by statute therefor.

**INTERSTATE COMMERCE—RIGHT TO TAX SALES.**—The sale of goods which are in another state at the time of sale, for the purpose of introducing them into the state in which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the state is a tax on interstate commerce. The imposition of a license tax on the person so making the sale of them is also, in effect, a tax upon the goods, and illegal, because a state cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the state, and have become a part of its general mass of property, they become taxable the same as other similar property within the state.

**CONSTITUTIONAL LAW—PEDDLERS—LICENSE—INTERSTATE COMMERCE.**—A statute defining who are peddlers, prohibiting them from dealing as such within the state without license, and providing a penalty for its violation, but making no discrimination nor distinction between articles made and owned by the citizens of any state or states, is not in conflict with the United States constitution, delegating to Congress sole power to regulate commerce between the states, and may be enforced against a peddler of sewing-machines made and owned by a citizen of another state.

*Seneca N. Taylor*, for the appellant.

*John M. Wood*, attorney-general, for the state.

**MACFARLANE, J.** Plaintiff was prosecuted upon information before a justice of the peace for following the business of

a peddler without having a license therefor. The case was appealed to the circuit court of Montgomery County, where it was tried, defendant found guilty, and a fine of fifty dollars imposed upon him. From the judgment he has appealed to this court, on the ground that a constitutional question is involved.

The case was submitted to the court upon the following agreed statement of facts:—

“For the purpose of dispensing with evidence in the above-entitled cause in the circuit court, it is agreed, by and between the parties to said cause, that the following are the facts in said case, and that said cause may be decided by the court on the following agreed statement, to wit:—

“1. That for more than five years last past, the Singer Manufacturing Company has been, and still is, a corporation, duly organized under the laws of the state of New Jersey, and a citizen of that state.

“2. That on and prior to the twenty-sixth day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company, on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery County, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing-machines, having with him in said wagon a certain new Singer sewing-machine, which, on said day, he offered for sale to various persons, at different places in said county, and on said day the defendant did find a purchaser for said machine, and did sell and deliver the same to David Portuchek, in said county.

“3. That said Singer machine in question was manufactured by said Singer Manufacturing Company, at its works in the state of New Jersey, and that said machine belonged to and was the property of said company, and that it was forwarded to this state by said company, and delivered to defendant as its agent, for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars, and the defendant, at the time of said sale, had no peddler's license.”

The statute under which defendant was convicted is as follows:—

“Sec. 7211. Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning-rods,

goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler.

"Sec. 7212. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents, or otherwise; and no peddler shall sell wines or spirituous liquors."

Section 7217 fixes the license fee to be paid for peddling with horse and buggy at twenty dollars for six months, for the use of the state.

Section 7218 fixes a penalty of fifty dollars for dealing as a peddler with horse and wagon without license.

Defendant insists that this statute, as applied to him, under the statement of facts agreed to, is obnoxious to that provision of the federal constitution (sec. 1, art. 8) which delegates to Congress the sole power to regulate commerce among the states.

This subject has, of late years, received much discussion and consideration from the courts of the country, both state and federal, and many of the questions involved have been firmly established. It is conceded by all that a law of a state which imposes a tax upon articles manufactured in or imported from another state, as a condition of the right to sell and dispose of them, would be in violation of this provision of the constitution. The difficulty in each case has been to determine the effect of the particular law under consideration; to determine whether in that case the commercial power of the federal government had ceased, and the power of the state had commenced. Solving these questions as they arose, it has been settled that it matters not whether the tax is imposed directly upon the commodity sold, or by way of license exacted of the persons who make the sales; the restriction on commerce would be the same in either case: *Welton v. State*, 91 U. S. 275; *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489.

By force of these decisions of the court having the highest judicial authority over the subject, it is settled that the sale of goods which are in another state at the time of the sale, for the purpose of introducing them into the state in which the regulation is made, is interstate commerce; that a tax on a sale of such goods, before they are brought into the state, is a tax on interstate commerce itself; that the imposition of a license tax upon the person making such sale is, in its effect, a

tax upon the goods themselves; that a state cannot tax goods beyond its jurisdiction: *Hynes v. Briggs*, 41 Fed. Rep. 469; citing *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489; *Brown v. Houston*, 114 U. S. 622; *Woodruff v. Parham*, 8 Wall. 123; *Cook v. Pennsylvania*, 97 U. S. 566; *Welton v. State*, 91 U. S. 275.

It has been equally well settled that as soon as goods are brought into a state, and have become a part of its general mass of property, they become taxable in the same manner as other similar property in the state: *Brown v. Maryland*, 12 Wheat. 419; *Brown v. Houston*, 114 U. S. 622; *Machine Co. v. Gage*, 100 U. S. 676. The question of most difficulty is, to determine in individual cases whether the property brought into one state from another has become a part of the general mass of the property of such state. The only rule yet laid down is, that so long as it remains in the original package in which it was brought into the state, it is beyond the control of the state laws attempting to restrict or prohibit its sale: *Leisy v. Hardin*, 135 U. S. 100. The rule is more elaborately stated by Chief Justice Marshall in *Brown v. Maryland*, 12 Wheat. 419, who, after suggesting the difficulties that might arise in distinguishing between what would be laying a duty on imports and what would be the acknowledged power of states to tax persons and property within their territory, says: "Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present, to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property of the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution."

The right of the state to require a license tax on certain avocations, and among them that of a peddler, is not questioned in this case, and has been recognized by the supreme court of the United States in many of the cases bearing on this question: *Machine Co. v. Gage*, 100 U. S. 676. Whoever shall deal in selling goods, wares, and merchandise, by going

from place to place to sell the same, is declared to be a peddler by the statute: Sec. 7211.

Applying these principles to the facts in this case, what is the logical conclusion? Defendant was engaged in going from place to place selling and trying to sell sewing-machines in Montgomery County, in this state, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale, delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler, and having no license from the state, he became liable to the penalties imposed by the statute, unless, for any reason, he was exempt from the operations of the law. This exemption is claimed on the ground that he was selling the machines as agent for the Singer Manufacturing Company, a corporation under the laws of the state of New Jersey, and a citizen of that state.

It will be observed that the statute now makes no discrimination between the sale of the products of this and any other state, as was the case in *Welton v. State*, 91 U. S. 275, and when the defendant was engaged in selling these machines the commercial power of the federal government did not extend over them on account of any discriminating legislation of the state by reason of their foreign character. The only question, then, is, whether this property, in the sale of which defendant was engaged, had lost its distinctive character as an import, and become subject to the taxing power of the state, or whether it continued under the protecting power of the federal government until sold and transferred.

The difficulty suggested by Chief Justice Marshall, of drawing the line of distinction between the restriction upon the power of the state imposed by the constitution, and the acknowledged power of the state to tax persons and property, meets us here. After careful consideration of the decided cases and the principle involved, we have come to the conclusion that as soon as the defendant, as agent for the foreign manufacturer, undertook to sell a machine in the manner and by the means adopted by him, it came within the taxing power of the state, and a sale thereof without a license made him amenable to the penalties of the law. The justice of this conclusion is manifest. The law places no restrictions or barriers on the commerce of citizens or other states; it im-



poses no burdens that are not borne equally by citizens of this state. The burdens of taxation are imposed and endured as a recompense for the protection the law affords to person and property, and that protection is thrown around all alike, the resident citizen and the citizen of other states.

The non-resident manufacturer and merchant voluntarily places his property under the protection of the laws of this state. Can it be unjust to require of him the same tribute that is required of his resident competitor in business? The framers of the constitution could never have intended to discriminate against any state or the citizens thereof. Indeed, it is universally conceded and contended that this commerce clause of the constitution was designed to prevent discriminations, and to encourage and foster free and unrestricted trade among the several states. All that can reasonably be required is, to accord to the non-resident rights equal to but not above those of the citizens; that with respect to commerce, state lines be obliterated, and the citizens of the Union stand upon the same footing, and have equal opportunities in their contests for trade and business.

We think the conclusion reached entirely consistent with the decisions of the supreme court of the United States, and directly borne out by some of them. The case of *Machine Co. v. Gage*, 100 U. S. 676, we consider directly in point. The code of Tennessee provided that all peddlers of sewing-machines, and selling by sample, should pay a tax of ten dollars. The agent of the Home Machine Company, a corporation of Connecticut, was required to take out license before he was permitted to peddle machines. The company sued to recover back the license fee, on the ground that the law was not valid as applied to one engaged in the sale of goods manufactured in another state. Plaintiff was defeated in the highest state court, and the judgment was affirmed on appeal to the United States supreme court. See also *Waring v. Mayor*, 8 Wall. 110; *Woodruff v. Parham*, 8 Wall. 123.

In the dissenting opinion of Waite, C. J., in case of *Robbins v. Taxing District*, 120 U. S. 489, he says: "I am unable to see any difference, in principle, between a tax on a seller by sample and a tax on a peddler, and yet I can hardly believe it would be contended that the provision of the same statute, now in question, which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from

another state, and expected to go back again." United States Circuit Judge Caldwell, of this circuit, takes the same position in a case recently decided by him, in which he holds that a foreign corporation, selling ranges which have been previously shipped into the state, and there stored, cannot avoid the payment of the license required of stove-range agents under the laws of Arkansas, on the ground that it is engaged in interstate commerce. The effect of the decision in that case was, that as soon as the ranges were stored for sale, they became subject to the taxing powers of the state: *Hynes v. Briggs*, 41 Fed. Rep. 469; see also *Ex parte Butin*, 28 Tex. App. 304; *State v. Richards*, 32 W. Va. 348.

That the constitution only requires, and was only intended to enforce, free interchange of commodities between citizens of different states, without regard to state lines, and that citizens of one state should have the right to sell their products in any other state, without prejudice or discrimination, we think clearly declared in *Woodruff v. Parham*, 8 Wall. 123, *Hinson v. Lott*, 8 Wall. 150, *Paul v. Virginia*, 8 Wall. 168, and many other cases. In *Hinson v. Lott*, 8 Wall. 150, Mr. Justice Miller, for the court, in conclusion says: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

The supreme court of Pennsylvania, in a recent case (*Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Am. St. Rep. 645), similar to the case at bar in nearly every material fact, held that a state law requiring a license of a peddler, though engaged in the sale of goods manufactured and owned by a citizen of another state, was not in contravention of the constitutional provision in respect to commerce among the states, but was simply a police regulation, and under the exclusive control of the state, so long as it made no discrimination against citizens of other states. The argument used is very plausible, and would merit careful consideration, did we not put our decision on other grounds which we believe founded upon the best of reasons, supported by the highest authority, and in perfect accord with the spirit and intent of the constitution.

Holding, then, as we do, that defendant was not exempt from the operation of the laws of the state regulating the license of peddlers, by reason of the goods sold being the property of a resident of another state, the judgment is affirmed.

**PEDDLERS, WHO ARE.** — For a definition of the term "peddler," see *Shannon v. Lewistown*, 132 Ill. 380; 22 Am. St. Rep. 540, and note. One who travels around with samples, soliciting orders for goods, representing a business firm located in another state, is not a peddler: *Corro Gordo v. Basellage*, 135 Ill. 36. Persons who are engaged as butchers, using a delivery-wagon in which to go about from place to place selling meats to their customers and soliciting orders, are peddlers: *Duluth v. Krupp*, 46 Minn. 435.

## **SHERRIN v. ST. JOSEPH AND ST. LOUIS RAILWAY COMPANY.**

[88 MISSOURI, 572.]

**MASTER AND SERVANT — FELLOW-SERVANTS.** — All are fellow-servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to one another, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them.

**MASTER AND SERVANT — FELLOW-SERVANTS — SECTION FOREMEN.** — Where two section foremen are employed by the same railroad company, and are engaged in the same department of work, neither having any supervision or control over the other, and both being subject to the orders of one road-master, they are fellow-servants, and such company is not liable to one for an injury caused by the negligence of the other.

*Sherry and Hughes*, for the appellants.

*Gardiner Lathrop*, for the respondent.

**GANTT, P. J.** On the ninth day of April, 1888, the plaintiffs filed in the Clinton County circuit court the following petition:—

"Maggie Sherrin and Grace Sherrin,  
by their next friend, William  
Honn, Plaintiffs,

v.

"The St. Joseph and St. Louis Rail-  
road Company, Defendant.

In the circuit court  
of Clinton County,  
Missouri.

"Plaintiffs, for their second amended petition, state that the said Maggie Sherrin and Grace Sherrin are minor children, and sole heirs at law of John Sherrin, deceased, aged

respectively six and three years; that the said John Sherrin died, leaving no wife; that the said William Honn is their duly appointed and qualified next friend.

"That the defendant is a corporation duly organized under and by virtue of the laws of the state of Missouri, and as such, at and before the time hereinafter mentioned, owned and operated a railroad from the city of St. Joseph, in Buchanan County, to Richmond and Lexington Junction, in Ray County, Missouri, and in and through Clinton County, Missouri.

"That John Sherrin, the father of plaintiffs, was, at the time hereinafter mentioned, employed by defendant in the capacity of foreman of what is called an extra gang of men, by virtue of which employment he had in his charge and under his control a force of ten men, who were subject to his orders; that as such foreman he was subject only to the orders of defendant's road-master, and was subject to be sent to any part of defendant's road by such road-master to do extra work thereon; that is, such work as did not properly fall within the duty of any local men, or was not assigned to other employees of defendant; and in the discharge of said duties, the said Sherrin was furnished by defendant with a hand-car for his use in and about his duties aforesaid, and for the purpose of transporting the men in his charge from place to place, and to and from their labor, along the line of defendant's railroad.

"That on the — day of —, 1887, the said John Sherrin, in the discharge of his duty, was passing along the line of defendant's railroad in charge of his force of men on said hand-car, and when at a point about one mile east of Plattsburg, on said road, the local section boss of defendant, in charge of and operating another hand-car, negligently run the said hand-car against the car upon which said Sherrin and his men were riding as aforesaid, thereby throwing said Sherrin from and in front of his said car, so as to cause both of said cars to run over him, causing injuries from which he died on the — day of —, 1887.

"Plaintiffs state that said hand-car so negligently managed and operated was at the time in charge of and being operated by one Ben Fort, a local section boss of defendant, and the employees of defendant in his charge and under his direction, and the same was furnished by defendant to said Ben Fort, to be used by him in and about his duties as said section boss, and in transporting the men in his control, while laboring for

defendant, from place to place along defendant's railroad, and to and from their labor in keeping the track and road-bed of defendant in repair in his section.

"That said Ben Fort was the local section-boss of defendant, stationed by defendant at Plattsburg aforesaid, and was, as such section-boss, subject only to the orders of defendant's road-master aforesaid, and defendant had placed him in charge of said section of defendant's track in which the injury occurred, and given said Fort charge and control of a force of ten men; that it was the duty of said Fort to employ and discharge his men, superintend and direct their work, keep their time, direct their movements, transport them to and from their work, and along defendant's line of road whenever their work required, and was furnished by defendant with a hand-car for that purpose.

"That said car upon which Sherrin was riding at the time of the injury was run into by reason of the negligence and carelessness of the said Ben Fort, and the men in his charge, operating their said car, in the performance of his duties as boss of said local gang of men, and by his carelessness in running, operating, and controlling said hand-car.

"Plaintiffs state that the said Sherrin was injured and killed as aforesaid by reason of the negligence of said Fort, and the employees of defendant under his direction in the charge of the same, in running and operating the same at the time and place aforesaid, to plaintiffs' damage in the sum of five thousand dollars, for which they pray judgment.

"SHERRY AND HUGHES,

"THOMAS J. PORTER,

"Attorneys for Plaintiffs."

To which petition the defendant, on May 28, 1888, filed the following demurrer:—

"Maggie Sherrin and Grace Sherrin,  
by Honn, next friend, Plaintiffs,

v.

"The St. Joseph and St. Louis Rail-  
road Company, Defendant.

In the circuit court  
of Clinton County,  
Missouri, May Term,  
1888.

"Now comes defendant and demurs to plaintiffs' second amended petition herein, and for cause thereof says: 1. That said petition fails to state facts sufficient to constitute a cause of action; 2. That this second amended petition is a new and different cause of action from the cause of action stated in the

first amended petition, and upon which a trial was held at the last term of this court. "JAS. LAMAR, Attorney."

The court sustained the demurrer, the plaintiffs excepted to the judgment of the court in sustaining the demurrer at the time, and in due time filed motions for new trial and in arrest of judgment, which being overruled and excepted to, they filed affidavit, and their appeal was allowed.

Assignment of errors: 1. The court erred in sustaining the demurrer; 2. The court erred in overruling plaintiffs' motion for new trial; 3. The court erred in overruling plaintiffs' motion in arrest of judgment.

The only question before us is, whether the court erred in sustaining the demurrer in this case. The court evidently sustained the demurrer on the first ground assigned, that the facts alleged in the petition showed that the deceased was a fellow-servant with Fort and the man in his employ, by whose negligence it was charged deceased was injured.

A master is not, in general, liable to his servant for damage resulting from the negligence of a fellow-servant in the course of their common employment: *Robb v. Pacific R. R. Co.*, 43 Mo. 187; *Proctor v. Hannibal etc. R. R. Co.*, 34 Mo. 112. In *Maore v. Wabash etc. R'y Co.*, 35 Mo. 533, this court said: "If we may venture a general proposition on the subject, it is, that all are fellow-servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them."

There may be some nicety and difficulty in peculiar cases in deciding whether a common employment exists; but in general, by keeping in view what the servant must have known or expected to have been involved in the services which he undertook, a satisfactory conclusion may be reached. It is useless to try to reconcile the various cases in the different states on this subject, and we will not attempt it.

Counsel for appellant relies upon *McDermott v. Hannibal etc. R. R. Co.*, 37 Mo. 285, in which this court held "that a section foreman, who is intrusted by the railroad company with power to superintend, direct, and control the workmen under his charge, is not a fellow-servant of such workmen." That case, however, is so unlike this that it can have no application. Here, according to the averments of the petition, Sherrin, the deceased, and Fort were both section foremen;

they were in the employment of the same company; they were engaged in the same department of work, one as a regular section foreman, with a particular piece of road to look after and keep in repair, the other as foreman of an extra gang, whose duty it was to look after and keep in repair such part of the road as "did not properly fall within the duty of any local men, or was not assigned to other employees of defendant." Both were subject only to the orders of one road-master. Neither had any control or supervision of the other. Both used hand-cars going to and from their work, and both were rightfully on the track of their common employer at the time of the accident.

In *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 390, quoted with approval by this court in *Smith v. Wabash etc. R'y Co.*, 92 Mo. 359, 1 Am. St. Rep. 723, it was said: "There is a clear distinction to be made, in their relation as to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence."

In the *McDermott* case, Dawson, the section foreman, ordered McDermott, one of his gang, to remove the hand-car from the track, and in the endeavor so to do, he was struck and injured. It was held that Dawson was a vice-principal. It was Dawson's relation to McDermott, his right to direct and control him, however, that moved the court to regard him as a vice-principal. In the case at bar, the petition shows no such relation between Sherrin, the deceased, and Fort. Neither had the least supervision or authority over the other.

Nor are we able to adopt the argument of appellant, that because Fort was controlling the car which ran over Sherrin, while performing a duty defendant was bound to perform, namely, keeping the tracks of defendant in repair, any negligence of which he was guilty would be imputed to the company. It is confounding two distinct rules of law; namely, the one which requires the master to use due care in furnishing the instrumentalities with which the servant is to do his work, and which is personal to the master, and renders him liable for a failure in that respect; and the other, that a master is not liable to his servant for the negligence of his fellow-servant in the same common employment. In this

case, it is clear, from the petition, that Sherrin and Fort bore the same relation to the company.

If it be said that Fort *pro hac vice* was the *alter ego* of the company, its vice-principal, and was performing a duty devolving upon the company, to repair and keep in safe condition its track, so also Sherrin was there performing a similar service of the same grade. Each must have contracted with a knowledge that the other's service was necessary, and his liability to neglect it in some way was one of the ordinary risks he was assuming.

It is not charged that Fort had failed, in any respect, in keeping his section in repair; the negligence complained of is his personal act of carelessness in running his hand-car so as to collide with Sherrin's.

The nature of their common work, the reasonably safe character of the instrumentalities necessarily used, the opportunities each would have of observing the other's conduct, the fact that they were in the same department under a common road-master, all conduce us to hold they were fellow-servants within the meaning of the law, and the company was not, under the allegations of this petition, liable for the negligence of Fort. The demurrer was properly sustained, and the judgment is affirmed.

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MASTER AND SERVANT — FELLOW-SERVANTS. — As to who are deemed to be fellow-servants and who are not, see *Rhodes v. Georgia R. R. etc. Co.*, 84 Ga. 320; 20 Am. St. Rep. 362, and note; *Ocean S. S. Co. v. Cheney*, 86 Ga. 278; *Ohio etc. Co. v. Percy*, 128 Ind. 197; *Brown v. Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496, and note; *Bergstrom v. Staples*, 82 Mich. 654; *Fraser v. Red River L. Co.*, 45 Minn. 235; *Dayhara v. Hannibal etc. R. R. Co.*, 103 Mo. 570, *post*, p. 900; *Butler v. Townsend*, 126 N. Y. 105; *Bean v. Western etc. R. R. Co.*, 107 N. O. 731; *East Tennessee etc. R. R. Co. v. Smith*, 80 Tenn. 114; *Unfried v. Baltimore etc. R. R. Co.*, 24 W. Va. 260.



## LILLY v. TOBBEIN.

[103 MISSOURI, 477.]

**WILLS.** — **JUDGMENT REFUSING TO PROBATE WILL,** on the ground that the plaintiff is not a competent party in interest to prosecute the suit, is not a bar to another suit in which competent parties are plaintiffs.

**WILLS.** — **CHARITABLE DEVISE OR BEQUEST** will be upheld and enforced, though made to a voluntary unincorporated association.

**WILLS.** — **ISSUES IN ACTIONS TO ESTABLISH.** — In a suit to establish a rejected will, the only issue is, whether or not the writing is the will of the testator, and in passing upon this issue the court will not construe the will nor decide its legality. If a particular clause has been inserted by fraud or forgery, the court may reject it as no part of the will; but if such clause is found to be part of the will, the whole must be probated, although such clause cannot be enforced.

**WILLS.** — **ACTION TO ESTABLISH — ISSUE.** — The question whether a devise to a church can or cannot be enforced cannot be decided in an action to establish a rejected will. Such question can be determined only after the instrument is established as the will of the testator.

**CHURCH SOCIETY, BY INCORPORATING,** does not lose its existence or become wholly merged in the corporation.

**WILLS.** — **ACTION TO ESTABLISH — PARTIES.** — An action to establish a rejected will, although technically a proceeding at law, has many of the features of a suit in chancery, and the equity rule allowing one or more members of a voluntary association to sue for all applies in such case.

**WILLS.** — **SUIT TO ESTABLISH — PARTIES — AMENDMENT — LIMITATIONS.** — When an action to establish a rejected will is commenced in the name of an unincorporated church society, and the petition is dismissed for want of capacity in the plaintiff to sue, members of such church, suing in their own behalf as well as in behalf of all members, may be substituted as plaintiffs by amended petition. Such amendment introduces no new cause of action, and relates back to the commencement of the suit so as to arrest the running of the statute of limitations.

*Karnes, Holmes, and Krauthoff, and William F. Woerner, for the appellants.*

*Alexander Graves, and Mansur and McLaughlin, for the respondents.*

**BLACK, J.** This case is now before us on rehearing. It was stated in the abstracts on both sides, on the former hearing, that the present suit was commenced by an incorporated association, and we decided the case on that theory of fact. It now transpires that it was commenced by an unincorporated association. While the error in this statement of fact affects but one or two questions, still it is deemed best to substitute this opinion for the one heretofore filed.

Ilett Tobbein died on the 25th of September, 1879, leaving

a wife, but no living children. He left a will, whereby he devised all of his property, real and personal, to his wife, Catharine, for her natural life, and at her death the one half to go to her heirs, "and the other and remaining half of my said estate I give and bequeath to the Catholic Church at the city of Lexington, in the state of Missouri." The will goes on to make provision for the payment of the debts, and then declares that the nominated executor, William A. Donaldson, shall, after the death of the wife, sell at public auction all of the real and personal property, and "divide the proceeds equally between the heirs of my said wife and the said Catholic Church at Lexington, according to the provisions herein aforesaid." The nominated executor died prior to the death of the testator.

The will was presented to the probate court of Caldwell County for proof and probate, but that court rejected the same on the 26th of December, 1879. The estate of the deceased was then ordered into the hands of the public administrator. At and prior to the last-mentioned date, the church was simply an unincorporated religious society. It was thereafter incorporated under the general laws of this state, and by its incorporated name commenced a suit in the Caldwell circuit court to establish the rejected will. That suit resulted in a judgment probating the will; but on the appeal prosecuted by the defendants, the judgment was reversed, without remanding the cause for new trial: *Catholic Church v. Tobbein*, 82 Mo. 418. Thereafter the church society, as an unincorporated association, brought this suit for the purpose of establishing the same will. The venue of the cause was changed to Jackson County, where a trial was had on an amended petition, resulting in a judgment that the instrument was the last will of Tobbein, to reverse which, the defendants prosecute this appeal.

To the original petition filed in this cause, the defendants demurred on the ground, among others, that the unincorporated church society had no power or legal capacity to sue. The demurrer was sustained, and thereupon an amended petition was filed, adding as plaintiffs, John J. Lilly, Michael Howell, Patrick O'Malley, and Thomas Clark, members of and alleged to be trustees of the church. These persons sue for themselves and all other members of the association. The amended petition also names one hundred or more persons, members of the church, as additional plaintiffs. To

this amended petition the defendants demurred, and this demurrer was sustained as to the unincorporated association, but overruled as to the new plaintiffs brought in by the amended petition.

The will is in due form, was properly signed by the testator, and was duly attested. It was admitted on the trial that the testator was, at the time of making the will, of sound and disposing mind, and that it was his own free act. The widow, it may be added, renounced the will, and elected to take under the law.

1. A point made in the trial court, and urged here, is, that the judgment of this court in the former case is conclusive upon these plaintiffs, and that they are barred and precluded from again bringing forward the instrument for the purpose of having it established as the will of Tobbein.

The incorporated society was the sole plaintiff in that case, and as the corporation was not organized until after the death of the testator, the conclusion seems to have been reached that the corporation had no such interest in the probate of the will as would give it a standing in court as the proponent. The judgment was, therefore, simply one of reversal. Where the final judgment is one upon the merits, it must be a judgment to the effect that the paper writing produced is or that it is not the will of the testator. This court gave no such a judgment. There was no judgment at all on the issue of will or no will. The judgment of reversal simply said the then plaintiff had no right to prosecute the suit, because it was not a party in interest. The final judgment in that case left no impediment in the way of a new suit by any one having the requisite interest.

2. The Catholic church at Lexington was, at the death of the testator, an unincorporated association, and not a legal entity. Ordinarily, there must be a devisee in existence capable of taking, otherwise the devise is of no validity. But it is well-settled law that a charitable devise or bequest will be upheld and enforced, though it is made to a voluntary unincorporated association: 2 Perry on Trusts, 8d ed., sec. 730; *Schmidt v. Hess*, 60 Mo. 591.

The defendants do not question the proposition just stated, but they do insist that this will fails to define, limit, or declare a charitable use. On the other hand, plaintiffs insist that a devise to a designated church is *ex vi termini* a devise to charity. Many authorities are cited and arguments made

on the one side and the other of these propositions. The statement of these issues of law presents the inquiry, whether the validity of the devise to the church can be properly determined in this suit, the object of which is to establish a rejected will.

Under our law, the will is first presented to the probate court to be proved and admitted to probate. The proceeding in that court is *ex parte* and without notice. The statute, however, provides that if any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by a petition to the circuit court contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made up, whether the writing produced be the will of the testator or not. From these provisions of the statute, it is plain to be seen that the only issue to be tried is, whether the writing is the will of the testator. In trying this issue, the court is not called upon to construe the will, nor is it called upon to say whether the provisions of the will are legal or illegal. If a particular clause has been inserted by fraud or forgery it may be rejected, and this for the plain reason that it is no part of the will; but when the particular clause is found to be a part of the will, the whole must be probated, and this, too, though the particular clause cannot be enforced. This question was fully considered in the recent case of *Cox v. Cox*, 101 Mo. 168, and as there said, quoting from 1 Woerner's Law of Administration: "If the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution." The question whether this devise to the church can or cannot be enforced is foreign to the issues in this case. Such questions can only be determined when and after the instrument is established as the will of Tobbein.

8. The statute allows "any person interested in the probate of a will" to prosecute a suit to contest the same, or to have one proved which has been rejected by the probate court. Assuming that the church is capable of suing, the fact that it is, by the will, made a devisee gives to it an interest which entitles it to prosecute this suit. The question then arises, whether that interest can be represented by the present plaintiffs.

It appeared in the former suit, as it does now, that, at the death of the testator, the Catholic Church at Lexington was

simply an unincorporated religious association. Thereafter the members of the church organized as a corporation, and that suit was instituted by the incorporated association. It was held that the incorporation of the plaintiff did not vest in it the property rights of the church society, and for that reason the plaintiff could not maintain the suit. Trustees of a charity are often incorporated for the purpose of executing the trust, and since the church society was doubtless incorporated to enable it the better to protect the devise in question, the correctness of the conclusion reached in that case, as to the rights of the corporation to prosecute the suit, may well be doubted. It was, however, held in that case, and we think correctly held, that the church society did not lose its existence, or become wholly merged in the corporation.

The constitution provides that "no religious corporation can be established in this state, except such as may be created under a general law for the purposes only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries": Art. 2, sec. 8. As a church can only be incorporated for the specified purposes, it was held that the church organization for religious purposes must continue after incorporation. In view of an intimation then made, this suit was commenced in the name of the unincorporated society, but a demurrer to the petition was sustained because of the want of capacity in the plaintiff to sue. It is now insisted that Lilly, O'Malley, Howell, and Clark, who were made parties plaintiff by the amended petition, and who are members of the church, and sue for themselves and all other members of the association, cannot prosecute this suit.

It is a well-established rule in equity pleading that one or more of the members of a voluntary association, whether organized for public or private purposes, may sue for and in behalf of all of the members: Story's Eq. Pl., 9th ed., secs. 94, 114 a. The right of a few persons to sue for themselves and all other persons similarly situated has been recognized by this court on several occasions: *Newmeyer v. Missouri etc. R. R. Co.*, 52 Mo. 81; 14 Am. Rep. 394; *Overall v. Ruenzi*, 67 Mo. 203. It is true that this is an equity rule, and we have no statute extending it to actions at law, as is the case in some of the states. It has also been said in several cases that a suit to contest a will, or to establish one which has been rejected by the probate court, is an action at law: *Lyns v. Marcus*, 1 Mo.

410; 18 Am. Rep. 599; *Swain v. Gilbert*, 3 Mo. 347; *Young v. Ridenbaugh*, 67 Mo. 574; *McBurath v. Hollander*, 73 Mo. 112; 39 Am. Rep. 484. Such a suit is doubtless one at law in the sense that it is a statutory proceeding. But this court said in the case of *Eddie v. Parke's Ex'r*, 31 Mo. 513, which was a suit to contest a will: "Although this is technically a proceeding at law, yet in many respects it partakes of the nature of a proceeding in chancery, and the rules recognized in courts of equity, with respect to the persons necessary to be made parties to a bill, we think, is to a great extent applicable to a case of this kind." Looking to the parties who should be brought before the court, the method of making up and submitting the issue of will or no will, and the character and form of the judgment, we can but conclude that a suit to contest or establish a will has many of the features of a suit in chancery; and the equity rule allowing one or more members of a voluntary association to sue for all should be applied to cases like the one in hand.

It results from what has been said, that it is a matter of no consequence that some of the other named plaintiffs have died or ceased to be members of the church, or are minors or married women. They may be disregarded as unnecessary parties.

4. It is further urged that the circuit court erred in allowing the amended petition to be filed, whereby competent plaintiffs were substituted for an incompetent one, and that the court erred in not sustaining the defendants' answer setting up the statute of limitations. Proceedings of this kind are governed by the practice act, except as otherwise specified in the statute concerning wills. Amendments may be made and allowed, the same as in other cases. The practice act provides, among other things, that when a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in: R. S. 1879; secs. 3556, 3567. These provisions of the code have always been liberally construed, and it is but every-day practice to bring in new parties plaintiff and defendant by way of amended pleadings; and there was no error in allowing this amended petition to be filed.

5. Proceedings in the circuit court to contest or establish a will must be brought within five years after probate or rejection of the same. This suit was commenced in due time by the unincorporated church association, but the amended peti-

tion, bringing in Lilly and others as plaintiffs, was not filed until after the expiration of the five years. The question whether the amendment, when made, related back to the commencement of the suit so as to prevent a bar is, of course, a different one from the right to make the amendment.

*Buel v. St. Louis Trans. Co.*, 45 Mo. 562, was a personal damage suit brought by the mother of the injured child. The cause of action was barred in one year. After the lapse of that time, the plaintiff's divorced husband, who for some reason had been made a defendant, was made a co-plaintiff by amendment, and the question was, whether that amendment related back to the commencement of the suit. The rule then laid down is to this effect: where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action, the running of the statute continuing down to the time the amendment is filed. Indeed, amendments may be allowed, rather than drive a party to a nonsuit, for the very purpose of saving the cause from the statute of limitations: *Lettman v. Barnett*, 62 Mo. 159; *George v. Reed*, 101 Mass. 378.

It is doubtless true, as many of the authorities cited hold, that an amendment bringing in a new party defendant will not relate back so as to prevent the bar of the statute as to the now party defendant; but there is a vast difference between substituting a competent for an incompetent plaintiff, and bringing in a new defendant. Substituting the party having the legal right to sue for the claim for which the action was brought, instead of another party improperly named as plaintiff, is not the commencement of a new action, and in such a case the amendment relates back to the commencement of the action: *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

Now, in the present case there has been no change in the cause of action itself. The subject-matter of the suit and the issues to be tried were the same after as before the amendment. So far as the defendants are concerned, this suit was commenced when process was served upon them. The suit has been, from first to last, prosecuted in the interest of the church, and we entertain no doubt but the amendment sub-

stituting the individual plaintiffs for the unincorporated association related back to the commencement of the suit, and the statute of limitation was arrested at that time.

But on behalf of some of the defendants, it is argued that the proceedings up to the time the amendment was made was a nullity, because prosecuted by a mere voluntary association, and for that reason the amendment was, in effect, the commencement of a new action. It is certain these defendants did not regard the suit as a void proceeding, for they appeared to the writ, stipulated for a change of venue, and pleaded to the petition. It would be going very far to say that a judgment establishing this will at the suit of the voluntary association would be a void judgment. We think such a judgment could not be successfully assailed in a collateral proceeding.

On the conceded facts, this will should have been probated at the outset, and the objections interposed by the defendants must be and are overruled. The judgment of the circuit court is therefore affirmed.

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PLEADING — AMENDMENT — STATUTE OF LIMITATIONS. — Unless a new cause of action is set up in an amendment, the plea of the statute of limitations will be determined with reference to the date when the original complaint was filed; Note to *Leatherman v. Times Co.*, 21 Am. St. Rep. 344; *Texas etc. Co. v. Mitchell*, 78 Tex. 64; *Landa v. Ober*, 78 Tex. 33; *East Tennessee etc. R. R. Co. v. Mahoney*, 89 Tenn. 311.

WILLS. — WHAT PERSONS ARE BOUND BY DECREES AND ORDERS GRANTING, REVOKING, AND REFUSING PROBATE OF WILLS: See extended note to *Schultz v. Schultz*, 60 Am. Dec. 353-362.

CHARITIES — GIFTS TO UNINCORPORATED ASSOCIATIONS. — Charitable bequests will be upheld, although given to unincorporated associations: *Owens v. Missionary Soc'y*, 14 N. Y. 380; 67 Am. Dec. 160, and note; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61, and note; *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495; *Kinney v. Kinney*, 86 Ky. 610. But see, *contra*, *Wilmoth v. Wilmoth*, 34 W. Va. 426.



## LEHEW v. BRUMMELL.

[108 MISSOURI, 544.]

**CONSTITUTIONAL LAW — SEPARATE SCHOOLS FOR WHITE AND COLORED CHILDREN.** — The constitution and laws of a state, providing separate schools for colored children only, are not forbidden by or in conflict with the fourteenth amendment to the federal constitution, and the fact that they have to go a greater distance to school than white children does not give them any actionable cause of complaint.

**CONSTITUTIONAL LAW — SEPARATE SCHOOLS FOR WHITE AND COLORED CHILDREN.** — The constitution and laws of a state which do not exclude colored children from the public schools, and which give them all school advantages and privileges afforded white children, merely separating the two races for the purpose of receiving instruction, deprive no one of any rights, and are but reasonable regulations of the exercise of such rights.

**PRACTICE — INFANTS — GUARDIAN AD LITEM.** — After infant defendants have been served with process, the suit cannot be further prosecuted against them until a guardian *ad litem* is appointed.

*E. M. Harber*, for the appellants.

*R. A. De Bolt*, for the respondents.

**BLACK, J.** The five plaintiffs in this case reside in school district number 4, in Grundy County, and each has children entitled to attend the public school maintained therein for the education of white children. In September, 1887, when this suit was commenced, the defendant Barr was the teacher, and three of the defendants were directors of the school district. The defendant Brummell is a man of African descent, and at the last-mentioned date had four children, all of whom resided with him in said district, and were of the ages entitling them to attend the public schools. These four children were the only colored children of school age in the district. No separate school was ever established or maintained therein for the education of colored children; but there was such a separate school in the town of Trenton, in the same county, three and one half miles from Brummell's residence. No white child in district number 4 had to go more than two miles to reach the school-house. These colored children were permitted to attend the school maintained for white children in district number 4, for a short time.

On the foregoing facts, a temporary injunction was awarded the plaintiffs, restraining Brummell's children from attending the school so established for white children, which was made perpetual on the final hearing of the cause, and the defendants appealed.

But two questions are presented by the briefs for our consideration. The first is, that the laws of this state concerning the education of colored children are in conflict with section 1 of the fourteenth amendment of the constitution of the United States, and therefore void.

Section 1 of article 11 of the constitution of this state makes it the duty of the general assembly to establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years; and section 3 of the same article declares: "Separate free public schools shall be established for the education of children of African descent."

A system of free public schools has been established by general laws throughout the state, and for all the purposes of this case it will be sufficient to notice the statutes concerning colored schools. The first section of the amendatory act of 1887 (Acts 1887, p. 264) provides: "When there are within any school district in this state fifteen or more colored children of school age, the school board of such school district shall be and they are hereby authorized and required to establish and maintain within such school district a separate free school for said colored children"; and the section goes on to say, in substance, that the term of such school, and the advantages and privileges thereof, shall be the same as provided for other schools of corresponding grade. "Should any school board neglect or refuse to comply with the provisions of this section, such school district shall be deprived of any part of the public funds for the next ensuing school year." The second section provides that "when the number of colored children of school age residing in any school district shall be less than fifteen, they shall have the privilege and are entitled to attend school in any district in the county wherein a school is maintained for colored children." Detailed provisions are then made whereby the district in which such children reside must pay its proper share of the expenses of maintaining the school in the other district which the children attend.

These statute laws simply carry out and put in operation the command of that section of our constitution before quoted, and the objection now made is leveled at the constitutional provision, and it is that which we are asked to strike down, because of the contention that it violates section 1 of the fourteenth amendment of the constitution of the United

States, which declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This section treats of different and distinct subjects, and the defendants do not point out or indicate to us the clause upon which they rely. The clause which declares that all persons born or naturalized in the United States are citizens of the United States, and of the state wherein they reside, can have no application to the case in hand further than this, that it points out and makes a distinction between citizenship of the United States and citizenship of a state. The next clause ordains that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States. The distinction just mentioned is carried into this provision, which relates, and relates only, to privileges and immunities of a citizen of the United States as distinguished from the privileges and immunities of a citizen of a state: *Slaughter-House Cases*, 16 Wall. 74; *Bradwell v. State*, 16 Wall. 130.

The common-school system of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States, as such. It is a right created by the state, and a right belonging to citizens of this state, as such. It therefore follows that the clause in question is without application to the case in hand.

We then come to the last clause, which is prohibitory of state action. It says: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." Speaking of this clause in its application to state legislation as to colored persons, Justice Strong said: "What is this but declaring that the law in the states shall be the same for the black as for the white? that all persons, whether colored or white, shall stand equal before the laws of the states, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be

made against them by law because of their color?" *Strauder v. West Virginia*, 100 U. S. 303. We then come to the simple question, whether our constitution, and the statutes passed pursuant to it requiring colored persons to attend schools established and maintained at public expense for the education of colored persons only, deny to such persons "equal protection of the laws."

It is to be observed, in the first place, that these persons are not denied the advantages of the public schools. The right to attend such schools and receive instruction thereat is guaranteed to them. The framers of the constitution, and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wisdom of the provision is no longer a matter of speculation. Under it, the colored children of the state have made a rapid stride in the way of education, to the great gratification of every right-minded man. The schools for white and black persons are carried on at a great public expense, and it has been found expedient and necessary to divide them into classes. That separate schools may be established for male and female pupils cannot be doubted. No one would question the right of the legislature to provide separate schools for neglected children who are too far advanced in years to attend the primary department; for such separate schools would be to the great advantage of that class of pupils. So, too, schools may be classed according to the attainments of the attendants in the branches taught. That schools may be classed on these and other grounds without violating the clause of the federal constitution now in question must be conceded. But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage.

It is true, Brummell's children must go three and one half miles to reach a colored school, while no white child in the district is required to go further than two miles. The dis-

tance which these children must go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of any one, white or black. The inequality in distances to be traveled by the children of different families is but an incident to any classification, and furnishes no substantial ground of complaint: *People ex rel. v. Gallagher*, 93 N. Y. 438-451; 45 Am. Rep. 232.

The fact must be kept in mind, for it lies at the foundation of this controversy, that the laws of this state do not exclude colored children from the public schools. Such children have all the school advantages and privileges that are afforded white children. The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right. As said in the case just cited, "equality, and not identity of privileges and rights, is what is guaranteed to the citizen." Our conclusion is, that the constitution and laws of this state providing for separate schools for colored children are not forbidden by or in conflict with the fourteenth amendment of the federal constitution; and the courts of last resort in several states have reached the same result: *People ex rel. v. Gallagher*, 93 N. Y. 438-451; 45 Am. Rep. 232; *State ex rel. v. McCann*, 21 Ohio St. 193; *Cory v. Carter*, 48 Ind. 328; 17 Am. Rep. 738; *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405.

A like result was reached in Massachusetts, under a constitutional provision similar to the fourteenth amendment, as to the question in hand: *Roberts v. City of Boston*, 5 Cush. 198. We are also of the opinion that our conclusion is in accord with the cases cited from the supreme court of the United States, the final arbiter of all such questions.

2. Brummell's minor children were made defendants, and the suit was prosecuted to final judgment against them, as well as against the other defendants, without the appointment of a guardian *ad litem* for the infants. After infant defendants have been served with process, the suit cannot be further prosecuted until a guardian *ad litem* is appointed: R. S. 1879, sec. 3477. As to these minors, whose names will be found in the record, the judgment is reversed, but as to the other defendants it is affirmed.

**CIVIL RIGHTS — EXCLUSION OF NEGROES FROM SCHOOLS.** — A statute establishing separate systems of schools for white and colored children is not in violation of the fourteenth amendment of the constitution of the United States; and where appropriate schools for the colored children are maintained, they may be lawfully excluded from schools established for white children: *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405; *Oery v. Carter*, 48 Ind. 327; 17 Am. Rep. 738; *People v. Gallagher*, 93 N. Y. 438; 45 Am. Rep. 232, and note 246-259. Compare *People v. Board of Education*, 101 Ill. 308; 40 Am. Rep. 196, and note 203, 204. Under the Political Code of California, which provides that "every school, unless otherwise provided by law, must be open for the admission of all children," etc., colored children cannot be refused admission to any public school, even though separate schools have been established for them: *Wysinger v. Crookshank*, 82 Cal. 588.

## DAYHARSH v. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

[108 MISSOURI, 570.]

**MASTER AND SERVANT — FELLOW-SERVANTS.** — A person employed to perform any of the master's duties to his servant is not a fellow-servant of the latter while such relation exists, and in respect to such duties and such delegation of authority, does not relieve the master from a proper discharge of such duties.

**MASTER AND SERVANT — FELLOW-SERVANTS — NEGLIGENCE.** — A person intrusted with a railway company's power of control of the practical business done at its round-house at the time of an accident, and also intrusted with directing the movements of the engines and employees engaged there, is the representative of the company, and not a fellow-servant with such employees so as to relieve the company of liability to one of them injured through such representative's negligence while working under his orders in respect to an act performed in pursuance of his authority over that branch of the business.

**MASTER AND SERVANT — VICE-PRINCIPAL — DUTY TO SERVANTS.** — It is the duty of the master, or of his vice-principal, to use ordinary care to furnish his servant with a place to work that is as reasonably safe as the nature of the employment will permit, and also to use ordinary care not to expose him to unknown dangers, or those not ordinarily incident to his employment.

**NEGLECT — EVIDENCE.** — In an action to recover for personal injuries caused by negligence, evidence as to the number and ages of plaintiff's children is inadmissible.

**PRACTICE — ERROR IS PRESUMPTIVELY PREJUDICIAL,** and one claiming it to be otherwise must show its innocuous character.

*Huston and Parrish*, for the appellant.

*A. W. Myers, and Stauber and Crandall*, for the respondent.

**BARCLAY, J.** Plaintiff was in defendant's service as a laborer under Mr. Stephens, who, as "hostler," had charge and care of defendant's engines in the round-house. As such, he

also had control and direction of the men necessary to assist him in that work. It is conceded that he had superintending oversight of plaintiff, but the claim is made that he was, nevertheless, a fellow-servant of the latter in respect of the movement of the engine which did the damage, and that consequently his negligence could not properly furnish a basis for a recovery herein. This is the main question in the case.

A person employed to perform any of the master's duties toward his servant is, while that relation continues, and in respect to such duties, no fellow-servant of the latter. The duties which the master owes the servant may, in many particulars, be delegated to subordinates, and the wide extent of modern business enterprises often necessitates so doing; but that delegation of authority does not relieve the master from a proper discharge of those duties.

In this case, Mr. Stephens, when the accident happened, was in entire charge of the place where the defendant's engines were kept and cared for when not in use, and of the men needed for the work upon and about them. It is not decisive of this case by what name his position, in that regard, was designated, nor whether he had authority to hire and discharge the men under him.

He was, obviously, intrusted at the time with the master's power of control of the practical business done at the round-house, of directing the movements of the engines and of the plaintiff, and of the other employees there. In exercising that control, it was part of his duty to use ordinary care to furnish plaintiff a place to work which should be reasonably as safe as the nature of the employment permitted: *Hannibal & St. Jo. R'y Co. v. Fox* (1884), 31 Kan. 586.

It was also a part of his duty (in exercising such authority over and direction of the railroad business at the round-house as had been committed to him by the master) to use ordinary care not to expose any man under his orders to risks unknown to the latter, not ordinarily incident to his employment.

Starting from these premises, which, we imagine, cannot at this day be fairly disputed, we go forward in the argument to other positions which are involved in some uncertainty, owing to the conflict of judicial decisions regarding them. We shall not attempt to review the precedents, but will merely state the principles, deducible from them, which meet our approval.

It was undoubtedly within the scope of Mr. Stephens's authority as "night hostler," or "boss," to direct where the engine and tender that struck plaintiff should be placed, and how and when they should be moved over the tracks. In giving directions to that end, and seeing to their execution, we think he was performing the master's part, and as such was the representative of the latter, and not a mere fellow-servant of the plaintiff.

If he had expressly directed the engine to be moved down by another upon the plaintiff, in the manner described in the evidence for the latter, the defendant would have been responsible for the act, and we are unable to perceive any logical or reasonable distinction between so directing it and his performing such negligent act himself, in the circumstances here shown. It was one which fell within his authority as the master's representative to direct, and it can make no difference in principle whether he did it personally or by another, in its bearing on the rights of the parties to this cause, where his act involved an obvious breach of the master's duty to use care to provide a reasonably safe place for plaintiff to work (as already defined). The performance of that duty was intrusted to the "hostler," and his negligence in not performing it is ascribable to the master.

In view of the result reached on another branch of the case, we do not deem it necessary to enlarge upon the reasons for the foregoing rulings at this time, but refer, instead, to some decisions in which they may be found: *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377; *Berea Stone Co. v. Kraft* (1877), 31 Ohio St. 287; 27 Am. Rep. 510; *Flike v. Boston etc. R. R. Co.* (1873), 53 N. Y. 549; 13 Am. Rep. 545; *Grizzle v. Frost* (1863), 3 Fost. & F. 622; *Reddon v. Railroad* (1887), 5 Utah, 344; *Rima v. Rossie Iron Works* (1890), 120 N. Y. 433; *Anderson v. Bennett* (1888), 16 Or. 515; 8 Am. St. Rep. 311; *Hannibal etc. R'y Co. v. Fox* (1884), 31 Kan. 586.

That there was evidence on plaintiff's part sufficient to justify the submission of the issue of defendant's negligence, in the backing of the engine upon him while at work, without warning, is not now seriously disputed. We also regard the question of the contributory negligence of plaintiff as one for the jury, on the facts disclosed.

2. But it becomes necessary to reverse the judgment, because of the admission of evidence of the number of plaintiff's children and their ages against the objection and exception of



defendant. The admission of such testimony has been positively disapproved by this court: *Stephens v. Hannibal etc. R. R. Co.* (1888), 96 Mo. 207, 9 Am. St. Rep. 836; and by other courts: *Pennsylvania Co. v. Roy* (1880), 102 U. S. 451; 1 Am. & Eng. R. R. Cas. 225; *Kreuziger v. Chicago etc. R'y Co.* (1888), 73 Wis. 158; *Dreiss v. Friedrich* (1882), 57 Tex. 70; *Pittsburg etc. R'y Co. v. Powers* (1874), 74 Ill. 341.

Whatever remarks are found in other cases to the contrary—for example, in *Winters v. Hannibal etc. R. R. Co.* (1867), 39 Mo. 468, and *Conroy v. Vulcan Iron Works* (1882), 75 Mo. 652—cannot longer be regarded as authoritative.

Nothing that took place at the trial can be considered as curing the error referred to. On the contrary, the only instruction given by the court on the measure of damages rather gave prominence to that piece of irrelevant testimony, by alluding to plaintiff's "situation in life," and to "the extent to which he is disabled from making a support for himself and family." In this condition of the record, we certainly cannot fairly pronounce the error harmless.

The rule on this subject is, that error is presumptively prejudicial. It devolves on a party claiming it to be otherwise, to show its innocuous character. Here we think such showing has not been successfully made, and a reversal must follow.

3. It is not necessary to discuss the other assignments of error.

The judgment is reversed and the cause remanded.

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**MASTER AND SERVANT — FELLOW-SERVANTS.** — As to who are fellow-servants and who are not, see *Sherrin v. St. Joseph etc. R'y Co.*, 103 Mo. 378; *ante*, p. 881, and note.

**MASTER AND SERVANT — VICE-PRINCIPAL.** — As to who must be deemed a vice-principal, and not a fellow-servant, see *Brown v. Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496, and note.

**MASTER AND SERVANT — MASTER'S DUTY TO FURNISH SAFE PLACE IN WHICH TO WORK.** — The master must furnish safe machinery, appliances, surroundings, etc., to his servants: *Chicago etc. R. R. Co. v. Hines*, 132 Ill. 161; 22 Am. St. Rep. 515, and note; *Kranz v. Long Island etc. R'y Co.*, 123 N. Y. 1; 20 Am. St. Rep. 716, and note; *Bomar v. Louisiana etc. R. R. Co.*, 42 La. Ann. 983; *Lytle v. Chicago etc. R'y Co.*, 84 Mich. 289; *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944; *Kern v. De Castro etc. Co.*, 125 N. Y. 50; *East Tennessee etc. R. R. Co. v. Aiken*, 89 Tenn. 245; *Sweet v. Ohio etc. Co.*, 78 Wis. 127; *Ocean S. S. Co. v. Matthews*, 86 Ga. 418; *Kroestad v. Northern etc. R. R. Co.*, 46 Minn. 18. The master cannot relieve himself from this duty by delegating its performance to another: *Texas etc. R'y Co. v. O'Feil*, 78 Tex. 486; *Trainor v. Philadelphia etc. R. R. Co.*, 137 Pa. St. 148; *International etc. R'y Co. v. Kerns*, 78 Tex. 294; 22 Am. St. Rep. 52, and note.

## RENSHAW v. MISSOURI STATE MUTUAL FIRE AND MARINE INSURANCE COMPANY.

[108 MISSOURI, 865.]

**INSURANCE — CONSTRUCTION OF POLICY.** — An insurance policy which insures against loss or damage by fire, without qualification, is broad enough to include all fires, however originating, and all damages therefrom, of whatever character.

**INSURANCE — EVIDENCE TO JUSTIFY VERDICT OF LOSS BY FIRE.** — In an action to recover for the loss by fire of an insured building, the lower portion of which was used as a retail grocery-store, in which gasoline, coal-oil, and matches were kept for sale, if it appears that the timbers of the building were burning when they fell, directly after an explosion in the building on the night of its destruction, though it does not appear that a fire was burning in the stove, or a gas-light or other light left burning at that time, while one witness saw a bright light different from a gas-light in the stove, and another heard a cry of fire just previously to the explosion, while others, passing prior thereto, saw no light, the evidence is amply sufficient to justify a verdict that a fire was in progress in the building previous to the explosion.

**INSURANCE — PROOF OF USE TO WHICH BUILDING IS PUT.** — In an action to recover for the loss of an insured building, if it does not appear to what use it was put, but questions are asked and rulings made upon the assumption that it was used as a retail grocery store, in which gasoline, coal-oil, and matches were kept for sale, it will be taken as conceded that the building was used for that purpose at the time of the fire.

**INSURANCE — CONSTRUCTION OF CONTRACT.** — A contract of insurance is to be interpreted the same as any other contract, and words should be given their ordinary signification, the object being to ascertain the meaning and intent of the parties, to be gathered from the whole instrument in the light of surrounding circumstances, in contemplation of which they are supposed to contract.

**INSURANCE — UNFINISHED BUILDING — PRESUMPTION.** — Where a building evidently designed for carrying on a mercantile business in the lower story, and for use as a residence above, is insured during its construction, with permission given to complete it, the insurer will be presumed to have known that the building might be occupied and used as a retail grocery store and residence, and that such store would be supplied with gasoline, coal-oil, matches, and all articles of merchandise usually kept in the business.

**INSURANCE — HAZARDOUS USE OF BUILDING — GASOLINE AND COAL-OIL NOT HAZARDOUS.** — A policy of insurance prohibiting the premises from use for carrying on a business denominated hazardous or extra-hazardous, or for storing therein articles so denominated, is not avoided by using such premises as a retail grocery store, where gasoline and coal-oil are kept for sale at retail, in the absence of a schedule of what should be denominated a hazardous business, or hazardous articles attached to or included in the policy, or of proof that it was not customary to so keep gasoline and coal-oil, or that the insured knew that they were prohibited under the terms of the policy; and the burden is on the insurer to show these facts in case of loss.

**INSURANCE — HAZARDOUS ARTICLES.** — A policy of fire insurance prohibiting the storing of hazardous articles in the premises will not prohibit keeping them for sale therein.

**INSURANCE — EXPLOSION AS AFFECTING LIABILITY OF INSURER.** — Under an unqualified policy of insurance against loss by fire, an explosion which is the result of an antecedent fire in the premises will not affect the liability of the insurer for the loss, though the principal damage resulted from the explosion, and not from the fire. It makes no difference whether the explosion was caused by accidental fire being communicated to coal-oil or gasoline, or whether it was caused by a gas-jet coming in contact with inflammable gas mixed with atmosphere, which had escaped and filled the room.

**INSURANCE — CONSTRUCTION OF CONTRACT.** — Fire insurance policy will be most strongly construed against the insurer.

*Rowell and Ferriss, and Joseph H. Zumbalen, for the appellant.*

*Chester H. Krum, for the respondent.*

**MACFARLANE, J.** This was an action on a policy of insurance, as follows: "Missouri State Mutual Fire and Marine Insurance Company of St. Louis, by this policy of insurance, in consideration of \$37.50, do insure William Renshaw and legal representatives in the sum of \$5,000, from August 17, 1887, to August 17, 1892, at twelve o'clock, noon, against loss or damage by fire on four brick buildings, \$1,250 on each, situated in St. Louis, on the west side of Fourteenth Street, between Market Street and Clark Avenue, block No. 209 E., house Nos. 7, 9, 11, and 13. Privilege given to finish. 1887, September 17, other insurance permitted."

To this policy was attached the following conditions: "If the risk shall be increased by any means whatsoever, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring," the policy should be void.

"And it is agreed and declared, that in case the premises or property hereby insured shall, at any time after making or during the continuance of this policy, be appropriated, applied, or used to or for the purpose of carrying on or exercising any trade, business, or vocation denominated hazardous or extrahazardous, or for the purpose of storing therein any of the articles denominated hazardous or extrahazardous, unless provided for specially herein, or hereafter agreed to in writing by this corporation, this policy shall then and thenceforth cease and be of no force or effect. Every policy of insurance issued by this company becomes void if more than

twenty-five pounds of gunpowder are kept in an insured building or on the premises where such insured property is contained." None of the other conditions have any bearing on the question in issue in the case.

Defendant's answer admitted the execution and delivery of the policy, and set up, by way of affirmative defense, a breach of the conditions of the policy, as follows: "Defendant avers and charges that said premises were used for the purposes of carrying on a business hazardous and extrahazardous, to wit: storing and selling therein of merchandise denominated gasoline, which is a dangerous and inflammable fluid, and greatly increases the risk of said insurance, and for this reason said policy became void and of no effect before the date of said alleged loss; that one of the conditions of said contract of insurance was, that if the situation or circumstances affecting the risk should be altered or changed so as to increase the risk, thereupon said policy should cease and determine; and defendant avers that the use of said inflammable fluid as aforesaid did increase the risk of said insurance and render said policy null and void."

It appeared from the evidence that these buildings were erected in the summer of 1887, and at the date of the policy were unfinished and unoccupied. The first floor of the houses was planned for occupation as retail business rooms, and the upper stories for lodging-rooms and families. One of the houses was occupied by a Mr. Newman from about the 1st of October. He used the ground-floor for a retail grocery store, and he, with his family, resided above. He kept gasoline in a galvanized iron tank in the store, and coal-oil in a similar tank and also in a barrel. These articles were used in his retail trade. About two o'clock in the night of November 1, 1887, there was a terrific explosion in this store-room, which demolished the building, and killed Mr. Newman and several members of his family who were sleeping above. At the time of the explosion there were about forty gallons of gasoline in the tank. It was shown that it was customary to keep one gas-jet burning in the store during the night, and that there had been fire in the stove during the preceding day. Whether there was fire in the stove or a gas-jet burning at the time of the explosion did not satisfactorily appear. The other facts will sufficiently appear in the opinion.

1. The first contention by appellant is, that there was no evidence on the trial that justified a submission to the jury of

the question, whether a loss occurred which was covered by the terms of the contract. The policy, by its express terms, insured the plaintiff against loss or damage to his buildings by fire. The contract is broad enough to include all fires, however originating, and all damages therefrom, of whatever character.

The evidence shows the building was closed about ten o'clock on the night of its destruction; that it had been the custom of the proprietor to leave one gas-jet burning during the night. The evidence did not disclose whether a light had been left burning on the night of this loss. A fire had been kept in a stove in the storeroom during the day preceding the disaster, but there was no evidence that it had been continued during the night. Gasoline, coal-oil, and matches were kept in the building.

A short time previous to the explosion, a witness testified that he passed on the opposite side of the street, and observed through the window a light, which he described as a "rather glowing blaze, different from a gas-light. It was quite a bright light, enough to attract my attention." Other witnesses, who passed previous to the explosion, testified that they observed no light in the building. One witness testified that she heard a cry of "Fire" just a moment before the explosion. When the explosion occurred, a blaze of fire was thrown up into the air, and timbers from the building were on fire immediately after it fell.

We are of the opinion there was abundant evidence, not only to authorize the submission to the jury, but to justify the verdict, that there was a fire in progress antecedent to the explosion. If there was such a blaze in the building as the one described by the witness, then no explanation of its existence there can be given on any other hypothesis than that a fire was at the time in progress. The fact that other witnesses had passed the premises a short time before without observing any light gives strength to this theory. The evidence of this witness alone, uncontradicted as it is, authorized a submission of the question to the jury.

2. During the trial, defendant called a witness who testified that he had been engaged as an insurance adjuster in St. Louis for twenty-two years, and was familiar with the insurance business in that city. This witness was asked in what class the article known as gasoline, was placed by insurance men in the city of St. Louis. This question was objected to

by counsel for plaintiff, who stated that there was no controversy that it was kept there as a part of a retail stock of groceries, and not otherwise stored. The court then stated: "I think if it is conceded that Mr. Newman kept a retail grocery store, and only kept coal-oil and gasoline there as part of his retail grocery stock, that does not come within the provision of the policy which would avoid the policy. I do not think it applies to either of them. The objection will be sustained."

After other questions had been asked this witness,—as to whether gasoline was designated by insurance companies as hazardous or extrahazardous; whether keeping it in an ordinary grocery store would be regarded as hazardous; whether higher rates of insurance were required on a stock of groceries, in an ordinary grocery store, on account of keeping gasoline as a part of the stock,—all of which were excluded by the court, defendant's counsel stated: "I offer testimony tending to show that the keeping of gasoline on these premises that were destroyed and sued for did increase the risk over what the risk was when the policy was issued."

The court: "I think I indicated a little while ago, when I said if it was conceded that the tenant kept an ordinary retail grocery store, and as a part of his stock in trade kept gasoline and coal-oil for sale, that that fact did not increase the risk or avoid the policy that is here sued on."

This proceeding is stated thus fully, for the reason that the evidence wholly fails to disclose the character of Newman's business, and the purposes for which gasoline was kept in the house. From these statements, made by counsel and the court, it will be taken as conceded that Newman kept a retail grocery store in the building, and kept therein gasoline and coal-oil to supply his retail trade.

A contract of insurance differs in no respect from other contracts as to the rules for their interpretation. The object is, as in all contracts, to ascertain the meaning and intention of the parties, to be gathered from the whole instrument, in the light of the surrounding circumstances in contemplation of which they are supposed to contract. Words should be given their ordinary signification in view of the subject of the contract. The contract of insurance was made before the building was completed, and permission was given in the policy to complete it. The building was evidently designed for carrying on a mercantile business in the lower story, and to

be used as a residence above. From these facts it will be inferred that, when the company issued the policy, it knew the building might be occupied and used in the manner Newman was using it, as a retail grocery store and residence, and that the store would be supplied with the articles of merchandise usually kept in the business.

Defendant contends that keeping gasoline in the store for the purpose of selling to his customers, at retail, avoided the contract, under the expressed condition that the policy should be void in case the premises insured should thereafter be used for carrying on a business denominated hazardous or extrahazardous, or for the purpose of storing therein any articles denominated hazardous or extrahazardous. The evidence offered was intended to prove that gasoline was an article denominated hazardous, and keeping it for such sale made the business in which he was engaged a hazardous business. From the common use of gasoline and coal-oil, for heat and light in families, they may be considered as common articles of merchandise, and that they are usually kept for sale in the retail stores. No schedule of what should be denominated a hazardous business or a hazardous article was attached to or included in the policy. Under the circumstances, the insured had the right to understand that he was at liberty to keep in stock, and sell at retail, these articles, and for doing so the policy would not be avoided, unless it should be shown that it was not customary to so keep them, or that plaintiff knew that they were prohibited under the terms of the policy. The burden was on defendant to prove these facts. There was no evidence tending to prove either the one or the other, nor, when defendant made the offer to prove the hazardous character of these articles, did he propose or offer to follow that proof by evidence of the custom of the business.

We think, also, that there is an intended distinction between storing an article and keeping it for sale. The meaning of the word "store" itself sufficiently indicates the distinction. Webster gives this definition to the word when used in this connection: "To deposit in a storehouse or other building for preservation." Defendant made no offer to show that it had any technical meaning in the insurance business. When it is intended to prohibit the keeping for sale any articles, the word "keep" is usually, if not uniformly, connected with the word "store," making the condition of the policy read, "keep

or store." The word "keep" having been omitted from this policy, it must have been the intention of the parties to permit the keeping for sale such hazardous articles as are ordinarily kept in such a business.

Our conclusion is, that a contract of insurance upon a building, made before its completion, authorized the use of the building in any common business to which its construction is adapted, and when the contract prohibits storing hazardous articles, it does not prohibit keeping them for sale in such business: *Archer v. Merchants' etc. Ins. Co.*, 43 Mo. 434; 1 Wood on Fire Insurance, 170; *Hall v. Insurance Co.*, 58 N. Y. 292; 17 Am. Rep. 255; *Niagara Fire Ins. Co. v. De Graff*, 12 Mich. 124; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Sims v. State Ins. Co.*, 47 Mo. 63; 4 Am. Rep. 311.

3. It is not seriously contended by counsel for defendant that if a fire was in progress before the explosion occurred, and the explosion was the result of the antecedent fire, the loss was not covered by the terms of the policy, though the principal part of the damage resulted from the explosion itself, and not from the fire. Indeed, most of the authorities cited by appellant concede that in such case the loss should be regarded as within the risk assumed by the insurer, though in those cases loss or damage from explosions was expressly excepted: *United Life etc. Ins. Co. v. Foote*, 22 Ohio St. 348; 10 Am. Rep. 735; *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70; 40 Am. Rep. 403; *Briggs v. North American etc. Ins. Co.*, 53 N. Y. 446; *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 396.

It being well settled that the loss in this case would be covered by the broad and unconditional terms of the policy if the explosion was the result of a pre-existing fire, the question is, whether or not the jury was properly instructed on that theory. If the issues were submitted under proper instructions, the verdict will be conclusive. The explosion and destruction of the property are not disputed. The question of fact for the jury was, Did a wrongful fire precede and cause the explosion? The court gave the jury the following instruction: "In determining whether the buildings insured were damaged or destroyed by fire, the jury may find that they were so damaged or destroyed by fire, if they believe from the evidence that a fire of some description upon some part of the premises insured was the original cause of the loss, although



they may also find from the evidence that such fire was followed by an explosion which was itself the direct result of the fire, and which brought about the fall of the buildings; in other words, if the jury believe from the evidence that the fall of the buildings was the direct result of some burning substance in contact with some part of the building, it is immaterial whether such result manifested itself in the form of combustion or of explosion, or of both combined. In either case, the damage which ensued was by the action of the fire, and is covered by the terms of the policy sued on in this action."

The defendant asked eight instructions, covering, in different language, substantially the converse of the proposition contained in the instruction given. These were all refused. One of the instructions was as follows: "The court instructs the jury that if they find, and believe from the evidence, that the buildings in question were thrown down by reason of some explosive substance being ignited by any means other than the buildings, or some one of them, or their contents, being on fire, then the plaintiff is not entitled to recover anything in this action for the damages resulting from said buildings being thrown down."

The instruction given is without fault, and fairly presented the case to the jury, upon the theory that a pre-existing unlawful fire caused the explosion. Defendant had the right to have the converse of the proposition submitted to the jury under an appropriate instruction, and the one asked should have been given, unless the loss was covered by the terms of the policy, though it was the result of an innocent fire coming in contact with inflammable gas or vapor. This necessitates the consideration of the question whether, in case the indemnity is against loss or damage by fire, without making any exception, a damage from explosion will be covered by the policy, though it was the result of an innocent fire coming in contact with inflammable gas or vapor.

The damage or loss for which, under this policy, the defendant makes itself liable is that resulting from fires. The policy undertakes to make no exception to any manner in which the fire may originate, nor to the manner in which the loss or damage may be accomplished. If fire was the direct and proximate cause of the damage, the responsibility therefor becomes fixed. It would make no difference whether it mani-

fested itself in combustion or explosion. The contention is, that a burning gas-jet or a fire in a stove is not such a fire as was contemplated by the parties when the contract was made. That is undoubtedly true; but an innocent fire communicated to combustible materials will produce a negligent fire such as was in contemplation of the parties to the contract. The fire contracted against was such as would, in its natural course, cause loss or damage.

A fire resulting from the explosion of a lighted coal-oil lamp, or from the ignition of paper, cotton, or other easily ignited substance left too near a heated stove or grate, which resulted in communicating fire to the insured property, would certainly be covered by the terms of the policy. It could make no difference how innocent the original fire, whether used to light or heat a room, or to run machinery; if communicated to the property insured, the loss would be by fire. It is seldom conflagrations originate from other causes than that of an innocent and lawful fire. It is impossible to draw a distinction between a fire communicated from a gas-jet, a lamp, or a stove to tangible combustibles and one communicated by the same agencies to intangible inflammable vapor or gas. The explosion of a coal-oil lamp, caused by the generation of gas, may not in a moment communicate the fire to the entire building, but it may result in as complete destruction as the ignition of gas which permeates every part of the building and destroys the whole by an instantaneous blaze.

Powder may be ignited either in quantities only sufficient to communicate fire to combustible materials around it, or sufficient to demolish the largest buildings. There would only be a difference in degree between the one and the other. No reason can be seen why an exception to an indemnity against loss by fire should be made because the work of destruction is instantaneous, and by explosion rather than when through the slow process of gradual communication and combustion. The defendant had it within its power to fix its own contract and its terms and conditions, or not accept the risk. It has done so by making itself responsible for loss for all fires, however started, and however rapid the demolition. It did not indemnify against fires occurring only in particular ways, but against fires generally, regardless of the manner of either their commencement or progress.

We are of the opinion that the loss was covered by the policy, whether the fire was started from a box of matches and was gradually communicated to the oil or gasoline, or whether communicated directly from the innocent gas-jet to the inflammable gas mixed with atmosphere which had escaped and filled the room. This construction is according to the plain terms of the contract. The conclusion reached is strengthened by the fact that no exception was made in the policy to damages caused by explosions. It is well known that policies of insurance usually contain such an exception, and it is fair and reasonable to assume that a company engaged in this business should know that such was the common custom. If defendant intended to relieve itself from such losses, it could easily have done so by the usual exception.

We think our conclusion well sustained by authority. The leading case on the subject is *Scriptors v. Lowell etc. Ins. Co.*, 10 Cush. 357; 57 Am. Dec. 111. In that case a burning match was applied to a cask of powder in the attic of the house, which caused an explosion of the powder, setting fire to the bed and clothing, injuring the walls and the furniture, and blowing off the roof of the house. Held, that the whole damage was covered by a policy insuring against loss or damage by fire. In case of *Waters v. Merchants' etc. Ins. Co.*, 11 Pet. 213, a boat was destroyed by an explosion of gunpowder. Loss on account of explosions was not excepted under the policy. Justice Story said: "Some suggestion was made at the bar, whether the explosion, as stated in the plea, was a loss by fire, or explosion merely. We are of the opinion that, as the explosion was caused by fire, the latter was the proximate cause of the loss."

In *City Fire Ins. Co. v. Corlies*, 21 Wend. 367, 34 Am. Dec. 258, the building was blown up by gunpowder, intentionally, to prevent spread of an existing conflagration. The policy indemnified against fire. Held, a loss by the peril insured against within the meaning of the policy.

In *Briggs v. North American etc. Ins. Co.*, 53 N. Y. 446, the plaintiff was engaged in rectifying spirits; vapor from the works filled the house, and coming in contact with a burning lamp, took fire, and an explosion ensued, blowing off the roof and blowing down the walls. The policy provided that the company should not be liable from explosions of any kind unless fire ensues, and then for loss or damage by fire

only. The court says: "It may be conceded that in the absence of this exception a recovery could have been had for the whole damage as for a loss by fire."

In *St. John v. American etc. Ins. Co.*, 11 N. Y. 516, the policy excepted loss occasioned by the explosion of a steam-boiler. The loss was from an explosion of a steam-boiler, which threw down the building, and immediately thereafter the ruins took fire, and were consumed. Justice Johnson says: "It is undoubtedly true, that if the policy contained no exception, this loss would clearly have been a loss by fire. There would be no occasion to consider how the fire happened, the parties not having contracted for indemnity against fire occurring only in particular ways, but generally against fires."

In *United Life etc. Ins. Co. v. Foote*, 22 Ohio St. 348, 10 Am. Rep. 735, the court defines an explosion generally to be a "sudden and rapid combustion"; "all explosions caused by combustion are preceded by a fire." "The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede explosion"; but he argues that they occur in such rapid succession that the combustion and explosion would be covered by an exception contained in a policy that the insurer will not be liable for loss or damage resulting from an explosion. In the absence of such exception, the court could only have held the loss to have been occasioned by fire. The St. Louis court of appeals, speaking through Rombauer, J., in considering a loss resulting from this same disaster, entertains similar views, though in that case it was not necessary to judicially pass upon the question: *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394. An insurance company makes its own conditions, and they will be interpreted most strongly against them.

In *Boatman's etc. Ins. Co. v. Parker*, 23 Ohio St. 94, 13 Am. Rep. 228, the insurance was upon an oil refinery. The property was destroyed by an explosion followed by a fire. The explosion was caused by gas escaping from the oil coming in contact with the fires under the stills. The policy provided that the company should not be liable for damages resulting from explosions caused by gas or other explosive substances. The policy insured against loss by fire. Held, that the ex-

ception did not cover damage by fire resulting from such explosion. To the same effect is *Commercial Insurance Co. v. Robinson*, 64 Ill. 265; 16 Am. Rep. 557. There being no exception in this policy exempting the company from liability for loss occasioned by combustion of gas or vapor which results in damage from explosion, we do not feel called upon or justified in ingrafting one upon it.

The instruction requested by the defendant was improper in confining the jury to a consideration of an explosion caused by an explosive substance coming in contact with a fire burning the building or its contents. None of the other instructions asked were more comprehensive.

Judgment affirmed.

**INSURANCE — LOSS BY FIRE, WHAT INCLUDED WITHIN.** — This subject has been fully discussed in the note to *Hillier v. Allegheny etc. Ins. Co.*, 45 Am. Dec. 657-661. As the cases on the subject are fully collated and cited therein, and as reference is made to other cases in the note to *Wheeler v. Traders' Ins. Co.*, 13 Am. St. Rep. 585, it only remains to add the recent authorities on the subject.

In *Balestracci v. Fireman's Ins. Co.*, 34 La. Ann. 844, the rule is reiterated that "the fair and reasonable interpretation of a policy of insurance against fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire to the amount of the actual injury to the subject of the risk, whenever that injury may arise directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and control of which could not be avoided. The doctrine that insurance against fire only covered damage resulting from actual ignition is long since exploded." Hence it is well settled that the damage and expense incurred in removing, with reasonable care suited to the occasion, insured goods from an apparent imminent destruction by fire are covered by a policy assuring against loss or damage by fire, although the building in which they were insured, and from which they were removed, was not in fact burned: *White v. Republic etc. Ins. Co.*, 57 Mo. 91; 2 Am. Rep. 22; *Balestracci v. Fireman's Ins. Co.*, 34 La. Ann. 844.

If goods prudently removed to preserve them from an impending fire in an adjoining building are stolen in consequence of such removal, the assurer is liable for the loss by such theft, notwithstanding a stipulation in the policy exempting him from liability for loss by theft: *Leiber v. Liverpool etc. Ins. Co.*, 6 Bush, 639; 99 Am. Dec. 695.

As to explosions, no doubt seems to remain that insurance against loss by fire includes all loss from explosions which are the direct result of an antecedent fire: *Renschaw v. Fireman's Ins. Co.*, 33 Mo. App. 394; *La Force v. Williams City etc. Ins. Co.*, 43 Mo. App. 518-535; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; *Smiley v. Citizens' etc. Ins. Co.*, 14 W. Va. 33; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; 16 Am. Rep. 557; although the policy expressly excepts liability for loss or damage arising from explosions of any kind. In *Renschaw v. Fireman's Ins. Co.*, 33 Mo. App. 403, it was said: "It is an elementary rule of the law of fire insurance that a policy against fire

includes loss by demolition caused by an explosion, when such explosion is the direct result of an antecedent fire. The defendant contends that this is the law only when the antecedent fire is within the risk of the policy, and that the rule has no application to a case where the ignition of the explosive substance; though followed by explosion, is almost instantaneous with the latter. Whether the explosions in this case, if more than one, were the result of ignition of fluids which were stored on the premises, or the result of the ignition of the explosive mixture of illuminating gas with air, and whether the fire, spark, or flame causing the ignition of such explosive substance was a negligent or unlawful fire, rests on mere inference from surrounding circumstances. We are bound, however, to take notice of the universally accepted scientific fact, that explosion of such substances is preceded by ignition and accompanied by intense heat. This being so, we are not prepared to say that when the policy insures against fire originating in any cause, a loss caused by the ignition of an explosive substance by an innocent fire is not within the risks covered by the policy." Under a policy excepting from liability for loss by explosions of any kind, it has been decided that a loss of the property insured by fire resulting from the explosion of a lighted lamp is such as to make the insurer responsible therefor. *Hoffman v. Kittanning Ins. Co.*, 132 Pa. St. 590.

Insurance against fire upon steamboats is insurance against fire caused by collisions. Thus insurers against fire are liable for loss occasioned by the sinking of a vessel caused by fire, though the fire is the result of a collision not insured against, if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, so that she might have been saved. *Insurance Co. v. Transportation Co.*, 12 Wall. 194. If a collision between steamboats caused fire on one of them, and it sank with insured goods on board before the fire reached them, it was decided that the insurer was liable for the loss, if the injury to the goods could have been prevented but for the fire. *New York etc. Steamship Co. v. Transatlantic Ins. Co.*, 132 Mass. 377; 42 Am. Rep. 440.

Insurance against all loss or damage by fire or lightning will cover all loss arising from all known effects of lightning, and not merely those arising from combustion; hence such insurance will cover loss occasioned by a tornado. *Spensley v. Lancashire Ins. Co.*, 54 Wm. 483.

Where a policy against loss by fire contains a clause that, if the building shall fall except by fire the insurance shall cease, and a portion of the walls fall, leaving the greater portion standing, the building is not fallen within the meaning of the policy, and if destroyed by fire while in that condition, the insurer is liable for the loss. *Brewer v. Liverpool etc. Ins. Co.*, 53 Cal. 101; 21 Am. Rep. 703. So long as the building remains standing, no matter how much it may be damaged by the action of the winds or other causes, the liability of the insurer for loss of the contents of the building by fire will continue. *Brown's Fuel Ins. Co. v. Corporation of Rotherham*, 80 Ill. 560. It seems, however, that if the greater portion of the walls of a building thus insured fall before the fire begins, which afterwards destroys the contents of the fallen building, the insurer will not be liable under the policy. *Nich v. Globe Ins. Co.*, 127 Mass. 300; 31 Am. Rep. 373.

A fire insurance policy excepting from liability for loss or damage resulting from any person or persons engaged in riot, or in riotous assemblages to the authority of magistrates, or to any other lawful authority, provided by conditions relieving from liability for loss when the fire shall be caused by

invasion, foreign enemy, insurrection, civil commotion, lawful military power, or usurped authority, does not relieve the insurer from liability for damage or loss by fire caused by a conspiracy between convicts, to free themselves of prison restraint, but who yielded immediately upon coming in contact with an officer authorized to arrest them, although in the mean time exaggerated reports were circulated, and a company of citizens and others armed themselves: *Straus v. Imperial etc. Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368.





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  19. **SPECIAL ISSUES — SUBMISSION OF, IN DISCRETION OF COURT.** — It rests in the discretion of the court whether a general verdict shall be taken or one in answer to special issues; and to justify a reversal of a judgment on the ground that the court refused to submit special issues, it must be shown that this discretion has been clearly abused. *Texas etc. Ry Co. v. Miller*, 308.
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  21. **APPEAL BOND CONSTRUED.** — Where the condition of an appeal bond given by a defendant on an appeal from a decree dismissing a bill and dissolving an injunction is, that if he "shall duly prosecute said appeal, and shall pay all damages, and damages growing out of the continuance of the injunction herein, costs of suit rendered and to be rendered, . . . in case the said decree shall be affirmed in said appellate court, then the obligation to be null and void, otherwise to remain in full force and

virtue," — the language of the bond will, considering the circumstances under which it was used, be construed to mean that the obligors undertook to pay all damages growing out of the continuance of the injunction in case the decree should be affirmed. *Shreffler v. Nadelhoffer*, 628.  
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### ARBITRATION AND AWARD.

1. **DEFENSE.** — Where the award of an arbitrator is to be conclusive by agreement of the parties, the fact that after the award was made the arbitrator ordered a rehearing upon the application of the defeated party is no defense to an action on the award. *Robinson-Rea Mfg. Co. v. Mellon*, 186.
2. **RIGHT TO REOPEN.** — Where an award by an arbitrator is to be conclusive by agreement of the parties, the arbitrator, after making his award, may correct any error appearing upon its face; but he cannot reopen it, go into a general hearing, and take testimony, upon the mere allegation of the defeated party that supposed errors exist. *Robinson-Rea Mfg. Co. v. Mellon*, 186.

See INSURANCE, 27, 28.

### ASSAULT.

1. **CHARIVARI PARTY, RESISTANCE TO.** — It is error to charge a jury, in an action to recover damages for being shot at a *charivari* party, that defendant was bound to inform such party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting and otherwise, to drive them away. It is not true that one who is being *charivari*ed for the third time by persons who on the previous times were warned away and directed to desist, and who then treated such warning with derision, and abusive and insulting remarks, has no right to fire into a body of rioters without notice and without commanding them to disperse. *Higgins v. Minaghan*, 428.
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3. **SELF-DEFENSE.** — One assaulted in such a way as to induce in him a reasonable belief of danger of losing his life or of suffering great bodily harm is justified in defending himself, although the danger is not real, but apparent only. A person will not be held responsible, civilly or criminally, if he acts in self-defense from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger. *Higgins v. Minaghan*, 428.

See RIOT.

### ASSIGNMENT.

1. **ASSIGNMENT OF MONEYS TO BECOME DUE — ENFORCEMENT OF, IN EQUITY.** — An assignment by a city contractor of his right to receive warrants subsequently to become due for work done on the streets vests an equitable interest therein in the assignee, which will be enforced in equity by directing the delivery of such warrants to him when they are issued. *Slott v. Francy*, 132.

- 2. ASSIGNMENT OF MONEYS TO BECOME DUE FROM CITY — OFFICER MAY BECOME ASSIGNEE.** — The president of a city council may become the assignee of warrants to be subsequently issued and paid by the city for work already done on its streets, even though the statute provides that "no member of the common council shall be interested in any contract or job the expenses of which are paid out of the city treasury." *Stott v. Francy*, 132.
- 3. ASSIGNMENT OF MONEYS TO BECOME DUE — RIGHTS OF ASSIGNEE.** — Where one of two joint contractors assigns his portion of warrants to become due for work done by them, the portion assigned will not be taken from the assignee, and turned over to the other joint contractor, to indemnify him against a possible claim of a creditor of the assignor who may seek to hold the contractors as partners. *Stott v. Francy*, 132.

See EQUITY, 5; EXECUTION, 3; MORTGAGES, 5.

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### BANKS AND BANKING.

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### BILLS AND NOTES.

1. **ONE WHO INDORSES IN BLANK A PROMISSORY NOTE** of which he is not the payee thereby authorizes the payee to write over such indorsement a guaranty of the payment of such note. *Moore v. McKenney*, 763.
2. **CONSIDERATION — PROMISE TO FORBEAR SUIT, AND TO GIVE FURTHER TIME FOR THE PAYMENT OF A NOTE**, though the time to be given is not made definite, is a sufficient consideration for the guaranty of such note.



by a third person, if it is followed by an actual forbearance for a reasonable time. *Moore v. McKenney*, 753.

2. **PRESUMPTION IN FAVOR OF HOLDER — BURDEN OF PROOF, WHEN SHIFTS.** — It is presumed *prima facie* that the holder of negotiable paper is the owner and took it for value before dishonor; but when fraud and illegality in its inception are pleaded in defense, and evidence to support the plea is introduced, the presumption is rebutted, and the burden of proof shifted to the holder to show that he is a *bona fide* purchaser for value without notice. *Commercial Bank v. Burgwyn*, 49.
4. **BANKRUPTCY OF MAKER AND INDORSER — DIVIDENDS AGAINST ESTATES OF BOTH.** — If both the maker and indorser of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not, in any event, be permitted to exceed in the aggregate the amount of the note. *In re Meyer*, 435.
5. **CONDITIONS DESTROYING NEGOTIABILITY.** — Anything written or printed on a negotiable instrument prior to issuance by the maker, relating to the subject-matter thereof, and tending to restrain or qualify it, is regarded as part of the contract; and if by such language payment is not necessarily to be made at all events, and for the full sum, at a time certain, subject to no contingency, its negotiability is destroyed. *Iron City National Bank v. McCord*, 166.
6. **ORDER ON BANK — CONDITIONS DESTROYING NEGOTIABILITY.** — An order drawn by a depositor on a bank, to pay to the payee named therein, or order, a certain sum nine weeks from date, and providing on its face that he or his transferee must present to the bank, with the order, a notice ticket, and also produce at or before the time of payment the drawer's deposit-book, is non-negotiable, and shows on its face that it is not a regular commercial check, and is not intended to operate as such, but was drawn on a specially deposited fund, held subject to certain rules and regulations requiring certain things to be done before payment could be required. *Iron City Nat. Bank v. McCord*, 166.

See FORGERY, 1; SALES, 3.

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line, there being no fraud or misrepresentation by either party. *Hess v. Smith*, 240.

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### BROKERS.

1. **STOCK-BROKER AND CUSTOMER — RELATION BETWEEN — PURCHASE OF STOCK ON MARGIN.** — The relation between a stock-broker and his customer in the purchase and sale of stock on commission amounts to this, that the broker purchases the stock as the agent of his customer, and then holds it as a pledge to secure a debt; and if by the transaction the customer is enabled to purchase stock on margin, which is prohibited by law, the transaction is void. *Cushman v. Root*, 462.
2. **LOAN BY BROKER OF HIS OWN MONEY USURIOUS WHEN.** — A broker who in good faith negotiates loans from others may charge the borrower a commission without rendering the loan, at full rate of interest, usurious; but he cannot charge a commission when he himself advances the money loaned, for the purpose of afterwards selling the security given to him. To sanction such a transaction would be to uphold a palpable evasion of the statute prohibiting usury. *Sanford v. Kama*, 662.

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### BURDEN OF PROOF.

See BILLS AND NOTES, 3; CARRIERS, 9; INSURANCE, 34; NEGLIGENCE, 11; RAILROAD COMPANIES, 19.

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2. **DEFENSES OF BORROWING STOCKHOLDER.** — Where the stock of a borrowing stockholder in a building association has matured, he has a right to stop paying assessments, and rely upon the surrender of the security for his loan, and when sued thereon he may set up as an equitable defense and show that his stock has matured, as a substitute for a bill in equity for that purpose, or he may be entitled to a *mandamus* to compel the association to declare the maturity of his stock. *Charles Tyrrell Loan and Build. Ass'n v. Haley*, 199.
2. **MATURITY OF STOCK — EVIDENCE.** — Where the constitution and by-laws of a building association provide for a division of profits when it shall be ascertained that stock has matured, a borrowing stockholder may show, when sued upon the security for his loan, that upon a proper application of such profits his stock has matured, and is worth par or is at a premium. *Charles Tyrrell Loan and Build. Ass'n v. Haley*, 199.

### CARRIERS.

1. **CLASSIFICATION.** — A common carrier may be either a carrier of passengers or of freight, or of both. *Thompson-Houston Electric Company v. Simon*, 86.
2. **THE NEGLIGENCE OF A COMMON CARRIER IS ESTABLISHED PRIMA FACIE** by proof of the delivery of property to and its acceptance by him for

transportation, and its non-delivery to the consignee. *Bennett v. American Express Co.*, 774.

2. **COMMON CARRIER CANNOT LIMIT HIS LIABILITY BY STIPULATION IN RECEIPT.** — Under the statutes of Illinois, a common carrier is prohibited from limiting his common-law liability safely to deliver property intrusted to him for transportation at the place to which it is to be transported, by any stipulation or limitation expressed in the receipt given for such property; but those statutes do not prohibit common carriers from limiting their common-law liabilities by contract with the owner of property delivered for transportation. *Chicago etc. Ry Co. v. Chapman*, 587.
4. **COMMON CARRIER CANNOT EXEMPT HIMSELF FROM LIABILITY FOR LOSS RESULTING FROM HIS GROSS NEGLIGENCE.** — A common carrier cannot, even by express contract, exempt himself from liability for damages resulting from the gross negligence or willful misconduct of himself or of his servants or employees; nor can he shield himself as to any portion of the damages to person or property occasioned by his or his servant's gross negligence or willful misconduct. *Chicago etc. Ry Co. v. Chapman*, 587.
5. **COMMON CARRIER MAY, BY EXPRESS CONTRACT, LIMIT HIS LIABILITY.** — A common carrier may, by express contract, limit his strict common-law liability to such damage as may occur on his own line of carriage, against loss by fire without his fault, and against other loss not attributable to his negligence, or that of his servants. *Chicago etc. Ry Co. v. Chapman*, 587.
6. **COMMON CARRIER CANNOT ARBITRARILY FIX VALUE OF GOODS, AND THEREBY LIMIT HIS LIABILITY.** — A common carrier cannot arbitrarily fix the value of goods delivered to him for transportation, and thereby limit his liability in case of loss. If a value be fixed by the carrier, and the contract of shipment is based thereon, the amount thus fixed will ordinarily determine the liability of the carrier. It will not, however, if untruthfully given in respect to property that the carrier had less opportunity to inspect and know the value of than the shipper, estop the carrier to show that the value was less than that fixed. *Chicago etc. Ry Co. v. Chapman*, 587.
7. **LIMITATION OF VALUE IN CARRIER'S RECEIPT NOT BINDING ON SHIPPER WHEN.** — Where a common carrier receives property for transportation, charges what he sees proper, and makes out a bill of lading without asking any questions as to the value of the property; a clause in the bill of lading attempting to limit a recovery, in case of loss, to a certain sum does not amount to an admission on the part of the shipper that the property is worth no more than that sum, where the latter makes no representations to induce the fixing of the value of the property at that amount; nor does it affect the question that the carrier had at the time two classifications of such property, one limiting the amount of recovery, and the other not limiting the amount, but charging a higher freight rate, where no notice was given to the shipper at the time of any such classifications. *Chicago etc. Ry Co. v. Chapman*, 587.
8. **STIPULATION IN A SHIPPING RECEIPT** that certain restrictions of liability therein contained should extend to and inure to the benefit of any other carrier to whom the goods might be delivered for shipment does not, however, protect the latter carrier if it, in receiving the goods

- enters into a contract of carriage on its own account from which the stipulation in question is omitted. *Browning v. Goodrich Tr. Co.*, 414.
9. **BURDEN OF PROOF IS UPON A CARRIER** to show that he has complied with his contract, and though his contract exempts him from liability for the "dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier," he must prove that he landed such goods from his vessel. *Browning v. Goodrich Tr. Co.*, 414.
  10. **CARRIERS ARE PRESUMED TO HAVE BEEN NEGLIGENT WHEN GOODS ARE LOST** and the circumstances of their loss are not explained. *Browning v. Goodrich Tr. Co.*, 414.
  11. **CARRIERS ARE ANSWERABLE FOR PROPERTY SEIZED AND TAKEN FROM THEIR POSSESSION BY AN OFFICER WITHOUT A WARRANT** or other legal process. As against the owner or consignee of the property, the seizure has no other effect than a like trespass by an unofficial person. *Bennett v. American Express Co.*, 774.
  12. **COMMON CARRIER MAY REQUIRE SHIPPER TO FIX VALUE OF GOODS.** — A common carrier may require the owner of goods offered for transportation to fix their value, so as to protect himself against fraud in case of loss. *Chicago etc. R'y Co. v. Chapman*, 587.
  13. **LIABILITY OF CONNECTING LINES.** — A connecting carrier is bound only, in the absence of special contract, to safely carry over its own line and to safely deliver to the next carrier. *Sasannah etc. R'y Co. v. Harris*, 551.
  14. **CONNECTING LINES — LIABILITY OF LAST OR INTERMEDIATE CARRIER.** — Where goods transported by connecting carriers are lost or injured, and the last carrier is sued therefor, it will be held liable, in the absence of proof that the loss or injury occurred on some preceding line, on the presumption that the goods were delivered to it in the same good condition in which they were delivered to the first carrier. *Sasannah etc. R'y Co. v. Harris*, 551.
  15. **CARRIER OF PASSENGERS — OBLIGATION TO CARRY, AND LIABILITY FOR LOSS OF BAGGAGE.** — A carrier of passengers undertakes, in carrying a passenger, not only to transport him, but to also carry a reasonable amount of his personal baggage as an incident to the principal contract, without any specific agreement or separate compensation; and as to such baggage he is under the same liability as insurer as a common carrier of goods or freight. *Oakes v. Northern Pacific R. R. Co.*, 126.
  16. **CARRIER OF PASSENGERS — BAGGAGE, WHAT IS.** — The personal baggage of a passenger which the carrier undertakes to transport under his contract to carry, and without extra charge, consists of such articles as the necessity, convenience, comfort, or recreation of the passenger may require him to take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey; but it does not include that which is carried for the purpose of business, such as merchandise or the like. *Oakes v. Northern Pacific R. R. Co.*, 126.
  17. **CARRIER OF PASSENGERS — BAGGAGE, WHAT DOES NOT CONSTITUTE.** — Stage properties, costumes, paraphernalia, and advertising matter of a comedy company are not personal baggage, nor included as such in the terms of a contract to carry a passenger, nor is the carrier liable for their loss or destruction, in the absence of negligence, unless he has accepted them as such baggage. *Oakes v. Northern Pacific R. R. Co.*, 126.

18. **CARRIER OF PASSENGERS — BAGGAGE — LIABILITY FOR.** — While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as baggage which are not properly such, it will be liable for their loss or destruction, though without fault. *Oakes v. Northern Pacific R. R. Co.*, 126.
  19. **CARRIERS TRANSPORTING GAME LIABLE TO PENALTY WHEN.** — The legislature may enact a statute making it unlawful for any carrier to transport game killed in the state, knowing the same to have been sold, or knowing that it is to be sold or offered for sale; and any carrier transporting game in violation of such statute will be amenable to the penalty prescribed thereby. *American Ex. Co. v. People*, 641.
  20. **A STATUTE IMPOSING A PENALTY UPON ANY PERSON KILLING, DESTROYING, OR HAVING IN HIS POSSESSION, BETWEEN THE FIRST DAYS OF OCTOBER AND JANUARY, MORE THAN ONE MOOSE, TWO CARIBOU, OR THREE DEER DOES NOT PROHIBIT COMMON CARRIERS FROM HAVING MORE THAN THREE DEER IN THEIR POSSESSION BETWEEN SAID DAYS FOR THE PURPOSES OF TRANSPORTATION.** *Bennett v. American Express Co.*, 774.
  21. **CONTRIBUTORY NEGLIGENCE OF PASSENGER DEFEATS HIS RIGHT TO RECOVER AGAINST A CARRIER, EVEN IN A CASE IN WHICH THE LATTER HAS NOT USED THE PROPER DEGREE OF CARE.** *Texas etc. R'y Co. v. Miller*, 308.
- See RAILROAD COMPANIES, 19-33.

### CHARITIES.

See DEVISE, 2.

### CHATTEL MORTGAGES.

**CHANGE OF POSSESSION.** — A mortgagee may employ a mortgagor to remain in possession of chattels mortgaged, and to sell them, and to pay the proceeds of the sale in satisfaction of the mortgage. *Hays v. Campbell*, 422.

See FIXTURES, 2, 2.

### CHECKS.

See BILLS AND NOTES, 6.

### CIVIL RIGHTS.

See SCHOOLS.

### CLERKS.

See JUDGMENTS, 20.

### COLLATERAL ATTACK.

See JUDGMENT, 8-15; PARTITION, 2.

### COMMERCE.

1. **INTERSTATE COMMERCE.** — FROM THE MOMENT THAT AN ARTICLE OF COMMERCE COMMENCES TO MOVE FROM ONE STATE TO ANOTHER, it becomes a subject of interstate commerce, and, as such, is subject only to national legislation, and not to the police power of the state. *Bennett v. American Express Co.*, 774.
2. **INTERSTATE COMMERCE — RIGHT TO TAX SALES.** — The sale of goods which are in another state at the time of sale, for the purpose of introducing

them into the state in which a regulation concerning their sale is made, is interstate commerce, and a tax upon them before they are brought into the state is a tax on interstate commerce. The imposition of a license tax on the person so making a sale of them is, in effect, a tax upon the goods, and illegal, because a state cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the state, and have become a part of its general mass of property, they become taxable the same as other similar property within the state. *State v. Emert*, 874.

2. **PEDDLERS — LICENSE — INTERSTATE COMMERCE.** — A statute defining who are peddlers, prohibiting them from dealing as such within the state without license, and providing a penalty for its violation, but making no discrimination nor distinction between articles made and owned by the citizens of any state or states, is not in conflict with the United States constitution, delegating to Congress sole power to regulate commerce between the states, and may be enforced against a peddler of sewing-machines made and owned by a citizen of another state. *State v. Emert*, 874.

See FISHERIES, 2; 3

### COMMON CARRIERS.

See CARRIERS.

### CONCURRENT NEGLIGENCE.

See JOINT LIABILITY.

### CONFESSIONS.

See EVIDENCE, 4, 12-14.

### CONFLICT OF LAWS.

See INTEREST; JUDGMENT, 24, 25; JURISDICTION; LEASE; MARRIAGE AND DIVORCE, 8; STATES, 3.

### CONNECTING CARRIERS.

See CARRIERS, 13, 14.

### CONSTITUTIONAL LAW.

See SCHOOLS; STATUTES.

### CONSTITUTIONS.

See WITNESSES, 1.

### CONTRACTS.

1. **CONTRACT FOR SALE OF STOCK ON MARGIN — RECOVERY OF MONEY PAID UNDER.** — A contract by which a stock-broker undertakes to buy and sell stocks for his customer, charging him with commissions and interest on the money advanced, and holding the stock as security until it is sold, the customer to receive or pay the difference between the buying and selling value of the stock, is a contract for its sale on a margin, and void within the meaning of a constitutional provision that a contract for the sale of stock on margin to be delivered at a future day is void, and that money paid on such contract may be recovered. In such case

the customer may recover property conveyed to the broker as security for his advances, without returning such advances actually made. *Cashman v. Root*, 482.

2. **DEALINGS IN FUTURES ILLEGAL.** — Dealing in futures is contrary to public policy; and contracts for the future delivery of stocks or produce, in which it is contemplated that the commodity shall not be delivered, will not be enforced. *Oliphant v. Markham*, 363.
3. **MONEY ADVANCED FOR USE IN BUYING FUTURES, WHEN NOT RECOVERABLE.** — If a party undertakes to advance to another money to be used in buying futures, and advances it upon such contract, the former, in order to recover the money so advanced, must prove the necessity for making the payments; and in order to do this, he will have to show not only the request to pay the money, but also the nature of the contract which gave rise to the necessity; and upon such showing he cannot recover. So, also, if he became interested in the contracts as agent, to keep them in force, his participation in the illegal transaction will bar his recovery for the money advanced. *Oliphant v. Markham*, 363.
4. **TEST OF ILLEGALITY OF CONTRACT.** — The test by which to determine whether or not a demand connected with an illegal contract can be enforced is, whether or not the plaintiff requires any aid from the illegal transaction to establish his case. *Oliphant v. Markham*, 363.
5. **ONE WHO BUYS FUTURES FOR ANOTHER, AND ADVANCES MONEY FOR THAT PURPOSE, CANNOT RECOVER IT BACK.** *Oliphant v. Markham*, 363.
6. **DEALINGS IN FUTURES ARE IN THE NATURE OF WAGERING CONTRACTS,** but are not strictly gambling contracts. A wager and a gambling contract are, however, so nearly allied that a jury is not likely to be misled by a charge in which one is used where the other ought to have been used, especially where the meaning was made clear beyond dispute by the previous part of the charge. *Oliphant v. Markham*, 363.
7. **STATUTE OF FRAUDS — PAROL PROMISE TO FOREGO EVICTION OF TENANT.** — An oral promise by a third person that he will pay the accruing rent to the landlord if the latter will forbear the eviction of the tenant for the non-payment of the rent, and permit him to remain to the end of the term, does not create a new debt on the part of the promisor, but is within the statute of frauds and void, as a mere promise to pay the debt of the tenant. *Riegelman v. Focht*, 293.
8. **THOUGH AN AGREEMENT IS VOID BECAUSE NOT IN WRITING,** its complete performance takes it out of the statute, and the fact that it was not in writing is no longer material. *Larsen v. Johnson*, 404.
9. **PROMISE TO FORBEAR TO SUE, NO PARTICULAR TIME BEING NAMED,** implies that the forbearance shall be for a reasonable time. *Moore v. McKenney*, 753.
10. **CONTRACT IS NOT VOID,** under section 2307 of the Revised Statutes of Wisconsin, because its consideration was the marriage of the parties, if the marriage is but an incident of the contract, and it is supported by a sufficiently valuable consideration aside from the marriage. *Larsen v. Johnson*, 404.
11. **PROVISION OF CONTRACT CONSIDERED IN ASCERTAINING INTENTION OF PARTIES.** — A provision in a deed of trust given to secure the payment of money loaned, that "the contracts embodied in this conveyance and the notes secured hereby shall in all other respects be construed by the laws of the state of Texas, where the same is made," may be considered

- in ascertaining and giving effect to the intention of the parties to the contracts. *Dugan v. Lewis*, 332.
12. PAROL EVIDENCE, WHEN INADMISSIBLE TO VARY. — Where a writing, upon its face, imports to be a complete expression of the whole agreement, and contains thereon all that is necessary to constitute a contract, it is presumed that the parties have introduced into it every material item and term, and parol evidence is not admissible to add another term to the agreement, although the writing contains nothing on the particular item to which the parol evidence is directed. *Harrison v. McCormick*, 469.
  13. CONSTRUCTION OF CONTRACT SUSCEPTIBLE OF TWO INTERPRETATIONS. If a contract is susceptible of two interpretations, one of which would render it merely senseless and nugatory, while the other is consistent with and accomplishes the intention of the parties thereto, the latter should be adopted. *Shreffler v. Nadelhoffer*, 626.
  14. CONSTRUCTION OF, WHEN A QUESTION OF LAW. — Whether or not a writing, upon its face, is a complete expression of the agreement of the parties is one of law. *Harrison v. McCormick*, 469.
  15. CONSTRUCTION OF, WHEN A QUESTION OF FACT. — Whether or not a contract entered into between a railroad and an independent line of steamers is a *bona fide* legal agreement, or was entered into for the purpose of creating an oppressive monopoly, is a mixed question of law and fact, and is properly left to the jury to determine. *South Florida R. R. Co. v. Rhodes*, 506.
  16. WHEN "ETC." IS SURPLUSAGE. — If the abbreviation "etc.," used in a contract, is meaningless, and does not render the writing incomplete as a contract of sale, nor justify the conclusion that it was not intended by the parties as a memorial of all the terms of their contract, nor in any manner affect the legal construction of the contract, it will be disregarded as surplusage. *Harrison v. McCormick*, 469.
  17. NEGLIGENCE OF CONTRACTOR — DEPARTURE FROM SPECIFICATIONS — LIABILITY TO THIRD PERSON. — A contractor who, in building a house, departs from the specifications embodied in his contract is liable to the owner for an inherent weakness in the building, by which an accident occurs after it is accepted and possession taken; but he is not liable for an injury to a third person, between whom and himself no contract relations exist. *Curtin v. Somerset*, 220.
- See BOUNDARY; BROKERS, 1, 2; BUILDING ASSOCIATIONS; CARRIERS, 3, 4, 5, 8, 9; DURESS; EQUITY, 1; FIXTURES, 4; INSURANCE, 1-3, 29, 44, 45, 52-59; INTEREST; USURY; WAGER.

### CONTRACTS OF SALE.

See VENDOR AND PURCHASER.

### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

### CORPORATIONS.

1. IN AN ACTION AGAINST THE STOCKHOLDERS OF AN INSOLVENT CORPORATION to compel them to contribute to the payment of its debts, it is only necessary, in order to make out a *prima facie* case, to establish that they have not in good faith paid the par value for the stock of the corporation. *Goyebic etc. Co. v. Iron Chief M. Co.*, 417.



2. **SUBSCRIBER TO THE STOCK OF A CORPORATION, WHO PAID THEREFOR IN PROPERTY** known to them to be worth much less than the par value of the stock received by him, is liable to the creditors of the corporation for the difference between the value of such property and the par value of the stock received therefor. *Gogebic etc. Co. v. Iron Chief M. Co.*, 417.
3. **THE ISSUANCE OF THE STOCK OF A CORPORATION FOR A WHOLLY INADEQUATE CONSIDERATION** is as much a fraud upon its creditors as though the corporation had disposed of any other debt due it for a wholly inadequate consideration, and a fraudulent holder of stock is liable to the creditors for its par value, less what he has paid for it to the corporation. *Gogebic etc. Co. v. Iron Chief M. Co.*, 417.
4. **UNPAID SUBSCRIPTION** to the capital stock of a corporation is an asset to which its creditors look for payment, and they have the right to insist upon its collection, the same as any other debt due the corporation. *Gogebic etc. Co. v. Iron Chief M. Co.*, 417.
5. **THE OBLIGATION OF A SUBSCRIBER TO THE CAPITAL STOCK** of a corporation to pay a subscription cannot be surrendered or released by the directors. They are bound to call in that which is unpaid, and to carefully husband it when received. *Gogebic etc. Co. v. Iron Chief M. Co.*, 417.
6. **A DEMAND THAT THE BOARD OF DIRECTORS OF A CORPORATION REDRESS AND CORRECT** fraudulent acts of which they are alleged to have been guilty need not precede the bringing of an action by a stockholder against them and the corporation to recover property and profits which they have fraudulently diverted to their personal benefit, by voting themselves salaries, and by other fraudulent acts. *Eschweiler v. Stowell*, 411.
7. **SUIT BY STOCKHOLDER. — WHEN THE DIRECTORS THEMSELVES ARE THE PARTIES** charged with a wrong, or by whose fraud or willful collusion a wrong has been accomplished, and a suit is to be brought against them, they are, by their own acts, incapacitated for the service of representing the corporation in any action for the restitution of its rights, and therefore suit may be brought in the name and on behalf of the individual stockholders, without first making a demand on the managing officers that they take action in the name of the corporation. *Eschweiler v. Stowell*, 411.
8. **SUBSCRIBER FOR STOCK OF A CORPORATION**, whether he is to pay for it in money or in property, impliedly agrees to pay its par value, and so far as the creditors of the corporation are concerned, its directors cannot release him from that obligation. *Gogebic etc. Co. v. Iron Chief M. Co.*, 417.
9. **LIFE TENANT AND REMAINDERMAN. — IF A DIVIDEND IS DECLARED BY A CORPORATION** of twenty-five dollars for each share of its stock, and any stockholder who wishes is entitled to take an additional share of stock for every four shares held by him, instead of receiving his dividend in money, and the earnings of the corporation are sufficient to pay the dividend, but if used for that purpose, then it will become necessary to raise an equal amount to pay for the additions which had been made to the capital, and which had increased its value at least twenty-five per cent above the par value of the whole stock, the dividend so declared is not a stock dividend, but must be treated as income, to which the life tenant is entitled. *Davis v. Jackson*, 801.
10. **DIVIDEND REPRESENTING PROFITS** is NO LESS TO BE TAKEN AS INCOME because a stockholder is at liberty to invest it at par in stock which is

- worth more than par, if he is also at liberty to sell the right to subscribe for the stock. *Davis v. Jackson*, 801.
11. THE MERE INCURRING OF A DEBT FOR CAPITAL does not of itself amount to an appropriation to capital of all the income on hand. *Davis v. Jackson*, 801.
  12. TRUSTS — BEQUEST OF CORPORATE STOCK — EVIDENCE OF VALUE. — Where corporate stock is bequeathed in trust to pay the income to a beneficiary for life, with remainder over, the actual value of the stock as ascertained from the value of the corporate assets at the testator's death, and not the fluctuations of the stock market, must control in determining whether new stock issued subsequent thereto, in lieu of profits applied to the improvement of the corporate property prior thereto, represents capital or income. In such case evidence of the market value of the stock is only admissible so far as it may aid in ascertaining the actual value. *Estate of Smith*, 237.
  13. FOREIGN CORPORATIONS — SERVICE ON PRESIDENT IN ANOTHER STATE. — In the absence of a statute, the president of a foreign corporation which only exists and does business in one state is not subject to the service of process while temporarily visiting another state, so as to bind the corporation in a transitory action against it arising in the state where it exists. *Phillips v. Burlington L. Co.*, 804.
  14. EVIDENCE. — THE STATEMENT OF A SUPERINTENDENT OF A CORPORATION TO AN OFFICER OF ANOTHER CORPORATION, that supports provided by the latter to support a tank are insufficient, is admissible in evidence against both corporations to show that each had notice of such insufficiency. *Consolidated etc. Co. v. Keifer*, 688.
  15. TRUSTS — RIGHTS OF BENEFICIARIES — BEQUEST OF CORPORATE STOCK. — When corporate stock is by the will of a decedent given in trust, the income thereof for the use of the beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which have not been divided until after his death, belong to the corpus of his estate. The dividends of earnings made after his death are income, payable to the life tenant, whether they are cash, scrip, or stock. *Estate of Smith*, 237.
  16. TRUSTS — RIGHT OF BENEFICIARIES — BEQUEST OF CORPORATE STOCK. — When corporate stock is bequeathed in trust, the income thereof to be paid to a beneficiary for life, with remainder over, the profit of a sale of new stock issued after the testator's death, in lieu of corporation profits applied to the improvement of the corporate property in the testator's lifetime, is capital, and not income, and belongs to the corpus of the estate. *Estate of Smith*, 237.

See RELIGIOUS SOCIETIES; WITNESSES, 2.

## CO-TENANCY.

POSSESSION OF ONE CO-TENANT IS POSSESSION OF THE OTHER. — The possession of land usually follows the legal title, where no adverse possession is shown, and the possession of one co-tenant, in the absence of an ouster, will inure to the benefit of his co-tenant. *Morrill v. Morrill*, 98.

See PARTITION.

## COUNTERCLAIM.

See SET-OFF.

## COUNTIES.

See COURTS; HIGHWAYS, 1-3; TOWNS.

## COURTS.

1. JURISDICTION. — A COUNTY COURT IN ILLINOIS, IN THE EXERCISE OF THE COMMON-LAW JURISDICTION conferred upon it by statute, is entitled to the same presumptions in favor of its jurisdiction as the circuit courts, or any other courts of record. *Anderson v. Gray*, 696.
2. POWER TO CORRECT RECORD. — Courts of record have inherent power to correct their records, so that they shall conform to the actual facts, and such corrections may be made at any time, without notice, either upon motion of the court or of any party interested, and the record when so corrected, as well as the order making the correction, is conclusive upon any other court in which it is offered in evidence. *Crim v. Keating*, 491.

See TRIAL, 5.

## COVENANTS.

## COVENANT OF WARRANTY NOT BROKEN BY LOSS OF TITLE BY LIMITATION.

— The covenant of warranty in a vendor's deed cannot be extended to cover future laches of the vendee, by which he loses, by limitation, the title to the land conveyed to him. A vendor can acquire from his vendee title by limitation after the deed is executed. *Hays v. Smith*, 340.

## CRIMINAL LAW.

1. GUILTY KNOWLEDGE OR INTENT, WHEN NOT ESSENTIAL TO CRIME. — Guilty knowledge or intent is generally an essential element in crime; but under a statute providing police regulations, and commanding that an act be done or omitted, which in the absence of such statute might be done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation. *Commonwealth v. Weiss*, 182.
2. GUILTY KNOWLEDGE NOT ESSENTIAL TO CRIME OF SELLING QUINMARINE. — Under a statute prohibiting the sale of elemmergerine, imposing a penalty for its violation, and containing no implication that the prohibited act must be done knowingly or willfully, ignorance of the real nature of the article sold will not constitute a defense for a violation of the statute. *Commonwealth v. Weiss*, 182.
3. GUILTY KNOWLEDGE OR INTENT AS ESSENTIAL TO CRIME, NOW DETERMINED. — Whether or not a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction, to be determined from the language of the statute, in view of its manifest purpose and design. *Commonwealth v. Weiss*, 182.
4. PRESUMPTIONS OF GUILT. — If a person who is found in possession of explosives has avowed his intention to use them for a particular unlawful purpose, the presumption arises that he procured them for such unlawful use, especially if there was nothing in his business requiring him to have or to use such explosives. *Heonak v. People*, 352.
5. REASONABLE DOUBT. — A doubt fairly derived from the evidence, that would cause one to pause and hesitate before acting upon any important transaction in life, is a reasonable doubt. It need not be such a doubt as would control a person, in order to be reasonable. *Commonwealth v. Miller*, 170.

6. EVIDENCE MUST FOLLOW ALLEGATIONS. — When a person is put on trial, he is entitled to a plain statement of the offense with which he is charged, and the evidence must be confined to that offense. *Coffee v. State*, 525.
  7. ACT FOR PRESERVATION OF GAME, CONSTRUCTION OF. — Where one section of an act for the preservation of game prohibits the taking or killing of game between the first day of December and the first day of October of each year, but is silent as to October and November, and a subsequent section of the act makes it unlawful for any person to sell or expose for sale any game killed within the limits of the state, a person may lawfully kill game for his own use, but not for sale, during the months of October and November. *American Ex. Co. v. People*, 641.
  8. NO ABSOLUTE OWNERSHIP IN DEAD GAME, UNLESS GIVEN BY LEGISLATURE. — The legislature has the right to permit persons to kill or take game upon such terms and conditions as its wisdom may dictate; and persons permitted to kill game have only such property interest in it, when killed, as the legislature may confer upon them. Persons permitted by law to kill, but not to sell, game have only a qualified property in it after it is killed. They may use it themselves, but cannot lawfully sell it to others. *American Ex. Co. v. People*, 641.
  9. OWNERSHIP OF GAME IS IN PEOPLE OF STATE. — The ownership of game is in the people of the state, and the legislature may withhold from or grant to individuals the right to hunt and kill game, or qualify and restrict such right, as in its opinion will best subserve the public welfare. *American Ex. Co. v. People*, 641.
- See ACCESSORIES AND ACCOMPLICES; ASSAULT; EVIDENCE, 4, 11-14; FOREGARY; HOMICIDE; IMPRISONMENT; INCEST; LOTTERIES; RAPE.

## CONVERSION.

See TROVER.

## DAMAGES.

1. LOSS OF TIME AND WAGES, INSTRUCTION AS TO, NOT ERRONEOUS WHEN. — In an action to recover damages for personal injuries, a charge to the jury instructing them that if they found for the plaintiff they should take into consideration his loss of time and wages, is not erroneous. No jury of ordinary intelligence would understand such charge to direct them to find damages both for plaintiff's loss of time and for the wages he would have earned during the time he was rendered, by his injuries, unable to labor. *Gulf etc. R'y Co. v. Wilson*, 345.
  2. PROSPECTIVE PROFITS which might have resulted from a catch of fish had the plaintiff's nets not been destroyed by the defendant's negligence cannot be allowed as damages, because from the character and conditions of the business the jury could have no sufficient basis for ascertaining such profits, and any assessment thereof must rest largely upon conjecture. *Wright v. Mulvaney*, 393.
- See APPEAL AND ERROR, 4; EVIDENCE, 5; LANDLORD AND TENANT, 2, 4-6; MORTGAGES, 2, 3; NEGLIGENCE, 12, 13; NEW TRIAL; PLEADING, 4; RAILROAD COMPANIES, 2-5, 9, 28; SET-OFF, 1; TRADE-MARKS, 5; VENDOR AND PURCHASER, 3.

## DEBTOR AND CREDITOR.

1. STATUTE OF LIMITATIONS — EFFECT OF APPLICATION OF PAYMENT BY CREDITOR. — A creditor may apply a payment to any debt not already barred

by the statute of limitations, and thereby prolong the running of such statute for six years from the time when the payment is made; but if the statute has already fully run before the payment is made, the creditor, while he may apply it to the barred debt without the direction of the debtor, cannot, by so doing, remove the bar of the statute as to the residue of the debt. *Blake v. Sawyer*, 762.

2. **INDORSEMENT — APPLICATION OF PAYMENTS.** — Where a creditor has several demands against the same debtor, one of which is secured by an indorsement, and he has procured attachments to be issued and levied upon all the demands, he has the right to apply the proceeds of the attachment to the satisfaction of the demands not secured by the indorsement, and then seek satisfaction, if necessary, from the indorser. *Morrison v. Citizens' Nat. Bank*, 39.
3. **INDORSER.** — WHERE A CREDITOR HOLDS SEVERAL DEMANDS against the principal debtor, under all of which attachments have been issued and levied, he has no right to insist that the creditor shall first apply the proceeds of the attachment to the satisfaction of the demand secured by the indorsement. *Morrison v. Citizens' Nat. Bank*, 39.
4. **PREFERENCE MAY BE GIVEN BY A FAILING DEBTOR** to any of his creditors, either by paying or securing a debt, and his other creditors cannot, on that account, avoid the payment or invalidate the security. *Haye v. Campbell*, 422.

See FRAUDULENT CONVEYANCE; PARTNERSHIP; PAYMENT, 1.

## DECREES.

See JUDGMENT AND DECREE.

## DEEDS.

1. **CONSTRUCTION OF.** — A GRANTOR CANNOT DESTROY HIS OWN GRANT, however much he may modify or load it with conditions. Having once granted an estate in his deed, no subsequent clause, even in the same deed, can operate to nullify it. *Maker v. Lazell*, 795.
2. **QUITCLAIM, WHEN WILL PREVAIL OVER PRIOR UNRECORDED DEED.** — A quitclaim deed duly recorded by a purchaser in good faith for valuable consideration, without notice, and after an examination of the records, and the exercise of reasonable diligence to discover outstanding interests, will prevail over a prior unrecorded deed. *Merrill v. Hutchinson*, 713.
3. **LIMITING EFFECT OF, TO A PARTICULAR CLAIM OF TITLE.** — If a conveyance purports to convey a tract of land, its effect cannot be limited or diminished by adding that it is intended to convey the title which was conveyed to the grantor by the deed of E. C. B., though the latter deed did not convey any title whatever. *Maker v. Lazell*, 795.
4. **FORGED DEED — EFFECT OF RECORD.** — A forged deed is void, and conveys no right, title, or interest, nor does the recording of such instrument affect the legal rights of the parties. *Haight v. Vallet*, 465.
5. **FORGED DEED — EJECTMENT — EVIDENCE.** — In ejectment to recover land alleged to be held under a forged deed, the jury have the right, in determining the question as to whether the grantor therein executed and acknowledged such deed, to take into consideration the subsequent conduct of such grantor, and whether he ever, after the date of the deed, set up any claim to the property or made any claim of possession upon

the parties in possession, paid the taxes or street assessments on the land, or did any act asserting ownership during his lifetime, and subsequent to the date of such deed. *Haight v. Feltz*, 455.

See APPEAL AND ERROR, 12; EVIDENCE, 1; HUSBAND AND WIFE, 8; TALLITION, 4, 5.

## DEEDS OF TRUST.

See CONTRACTS, 11.

## DEFINITIONS.

Accident. *Richards v. Travelers Ins. Co.*, 455; *Healey v. Mut. Acc. Ass'n*, 637.

"Appropriation to capital." *Davis v. Jackson*, 591.

Baggage. *Oakes v. Northern P. R. R. Co.*, 126.

Capital. *Smith's Estate*, 237.

Collateral attack. *Morrill v. Morrill*, 95.

Common carrier. *Thompson-Houston E. Co. v. Simon*, 86.

Contributory negligence. *Taylor etc. R'y Co. v. Taylor*, 316.

Conversion. *McPheters v. Page*, 712.

Election. *State v. Taylor*, 51.

"Establish and regulate markets." *Jacksonville v. Ledwith*, 558.

"Etc." *Harrison v. McCormick*, 469.

Eviction. *Brown v. Holgate etc. Co.*, 544.

"External, violent, and accidental means." *Richards v. Travelers Ins. Co.*, 455.

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Forgery. *State v. Wheeler*, 119.

"Free of partial loss." *Mayo v. India M. Ins. Co.*, 753.

Gambling contract. *Oliphant v. MarEham*, 363.

Income. *Smith's Estate*, 237.

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"Marriage." *State v. Buttick*, 809; *Kilburn v. Kilburn*, 447.

"Marital rights, duties, or obligations." *Kilburn v. Kilburn*, 447.

Money. *Jacob's Estate*, 230.

"Occupation." *Union M. Acc. Ass'n v. Frohard*, 664.

Officer de facto. *State v. Taylor*, 51.

Passenger. *Gulf etc. R'y Co. v. Wilson*, 345.

Patent. *Putnam Nail Co. v. Dulaney*, 228.

Peddler. *State v. Emert*, 614.

"Playing policy." *State v. Kansas M. Ass'n*, 721.

Privileged communication. *Conroy v. Pittsburgh Times*, 103.

Privileges. *Jacksonville v. Ledwith*, 558.

Proximate cause. *Banting v. Hogeott*, 192.

Reasonable doubt. *Commonwealth v. Miller*, 110; *Wagner v. People*, 593.

"Total loss only." *Mayo v. India M. Ins. Co.*, 753.

Trade-mark. *Putnam Nail Co. v. Dulaney*, 228.

Wager. *Oliphant v. MarEham*, 363.

Within ninety days. *Richards v. Travelers Ins. Co.*, 455.

## DENTISTRY.

CONSTITUTIONAL LAW.—STATUTE PROHIBITING ANY PERSON FROM PRACTISING DENTISTRY unless he has received a dental degree from some

college or a House from a dental society, but exempting from its provisions persons who have resided or practiced their profession in the town or city of their present residence during all the time since January 1, 1875, or who reside out of the state and are called upon to attend patients within it, is unconstitutional and void, because it discriminates against persons engaged in the same business or profession. *State v. Heman*, 22.

### DEPOSITIONS.

**ESTATES OF DECEDENTS — STIPULATION FOR DEPOSITIONS — WAIVER OF OBJECTIONS.** — A stipulation that depositions are to be taken subject to objection as to the propriety, relevancy, and materiality of the interrogatories contained therein is not a waiver of an objection thereto on the ground that the testimony given is of facts occurring prior to the death of the decedent, to whose estate it relates, where the statute precludes witnesses from testifying to any fact occurring before the death of such decedent. *Fox v. Tey*, 474.

### DEVISE.

1. **POWER TO DISPOSE OF THE FEE OF REALTY.** — A devise of land to the testator's widow "to be for her sole use and benefit, so long as she shall live, with power to dispose of the same if necessary for her support and comfort in this life," vests in her the power to dispose of the fee if necessary for her support and comfort, though the will further declares that whatever remains after her death shall go to the heirs of the testator. *Larsen v. Johnson*, 404.
2. **CHARITABLE DEVISE OR BEQUEST** will be upheld and enforced, though made to a voluntary unincorporated association. *Lilly v. Tobbin*, 887.  
See HUSBAND AND WIFE, 9; WILLS, 2.

### DISQUALIFICATIONS.

See JUDGES.

### DIVIDENDS.

See CORPORATIONS, 9, 10, 12, 15, 16.

### DIVORCE.

See MARRIAGE AND DIVORCE.

### DOMICILE.

1. **JURISDICTION.** — FOR THE PURPOSES OF JURISDICTION and judicial administration, a person must have a domicile somewhere, and a domicile once existing continues until another is acquired elsewhere. *Ayer v. Weeks*, 37.
2. **DOMICILE IS NOT DESTROYED BY LEAVING A STATE**, intending never to return, until another domicile is acquired in some other place. *Ayer v. Weeks*, 37.

### DOWER.

See HUSBAND AND WIFE, 2.

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**DURESS CONSISTING IN WITHHOLDING PROPERTY UNLAWFULLY INVALIDATED CONTRACT.** — A contract made in order to regain possession of

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See HUSBAND AND WIFE, 2.

### DURESS.

**DURESS CONSISTING IN WITHHOLDING PROPERTY UNLAWFULLY INVALIDATES CONTRACT.** — A contract made in order to regain possession of

property unlawfully detained may be avoided on the ground of duress. *Oliphant v. Markham*, 363.

### EASEMENTS.

See PRIVATE WAY.

### EJECTMENT.

1. **SECOND ACTION ON AFTER-ACQUIRED TITLE.** — Two suits may be maintained against the same person at the same time to recover the same land, if the second suit is brought on title acquired after the commencement of the first. Hence the pendency of an action by one holding the equitable title is not a bar to another action by the same plaintiff against the same defendant for the same land, on an after-acquired legal title. *Leonard v. Flynn*, 500.
2. **EQUITABLE ESTOPPEL.** — In ejectment by one having perfect title to the land, the fact that defendant, shortly after his entry, placed valuable improvements on the land, with the knowledge of and without objection by plaintiff, who knew that he claimed the land as his own, and who made no claim of any interest therein, will not constitute an equitable estoppel against plaintiff. *Leonard v. Flynn*, 500

See ABATEMENT; DEEDS, 5; TRESPASS, 2.

### ELECTIONS.

1. **IMPERFECT BALLOTS — EVIDENCE OF INTENT.** — Ballots cast at an election, for "Calvert," "A. L. Calvert," and "J. C. Calvert," may be shown to have been intended to be cast for "G. L. Calvert," when there is but one candidate by the name of Calvert to be voted for at such election. *Calvert v. Whitmore*, 718.
2. **ESSENTIALS OF.** — It is essential to a valid election that it be held by lawful authority, substantially as prescribed by law. *State v. Taylor*, 51.
3. **ELECTION CONDUCTED BY USURPER IN OFFICE IS VOID.** — Where a registrar of voters appoints a clerk who fraudulently gets possession of the registration-books, and, refusing to surrender them upon demand of the registrar, appoints judges of election, opens polls, receives, canvasses, and makes returns of voters, he is a mere usurper, and such election is void. *State v. Taylor*, 51.

See LANDLORD AND TENANT, 6; LEGACIES, 1.

### EMINENT DOMAIN.

See RAILROAD COMPANIES, 1-3.

### ENTIRETIES.

See HUSBAND AND WIFE, 3.

### EQUITY.

1. **REFORMATION OF A CONTRACT ON ACCOUNT OF A MISTAKE OF LAW** will be decreed, if it does not express what the parties intended it should, owing to their mutual misapprehension of the legal effect of the language used therein. *Eastman v. Provident Mut. R. Ass'n*, 29.
2. **LACHES.** — THE FAILURE OF THE HEIRS AT LAW OF A DECEDENT TO CLAIM THEIR INTEREST IN HIS ESTATE for twenty-three years, during

which time his property has been used and controlled by another as his own, precludes them from afterwards asserting their claims thereto. *Allen v. Colburn*, 20.

3. **STALE CLAIM, QUESTION OF FACT.** — What constitutes a stale claim in equity is not determined by lapse of time alone, but the question must be determined by the facts and circumstances of each case, according to right and justice. *Neppach v. Jones*, 145.
4. **STALE CLAIM — STATUTE OF LIMITATIONS.** — Equity in determining whether or not a claim is stale is not confined to the period named in the statute of limitations, but may refuse relief in cases where the delay is less or greater than that named in the statute. *Neppach v. Jones*, 145.
5. **STALE CLAIM.** — An assignee of an insolvent, who without excuse delays ten years after the execution of the assignment in asserting claim to property which for five years has been in possession of one who purchased it at execution sale, and who, during that time, was openly asserting his title in court, presumably with the knowledge of the assignee, is not entitled to relief against such purchaser in equity. His claim is stale, and fatal to the merits of his suit as assignee. *Neppach v. Jones*, 145.

See ASSIGNMENT, 1; BUILDING ASSOCIATIONS, 2; EXECUTION, 2; INSURANCE, 46; LEGACIES, 2; PLEADING, 6

#### ERROR.

See APPEAL AND ERROR.

#### ESTATES.

See CORPORATIONS, 9, 12, 15, 16; DEVISE.

#### ESTOPPEL.

See BOUNDARIES; EJECTMENT, 2; EQUITY, 2; HIGHWAYS, 1-3; HUSBAND AND WIFE, 2; INJUNCTION; INSURANCE, 23, 35; PARTITION, 2.

#### EVICITION.

See LANDLORD AND TENANT, 1, 2.

#### EVIDENCE.

1. **DEED — PAROL EVIDENCE TO FIX BOUNDARIES.** — If the east and west boundaries of lands conveyed by a deed are therein declared to be the lands of the grantor, oral evidence is admissible to fix such boundaries by showing that when the deed was delivered the grantor pointed out four stakes to the grantee, and said that the land conveyed was between those stakes, and that subsequently the land between those stakes was inclosed by fences erected by the grantor and the grantee. *Hooten v. Comerford*, 861.
2. **HEARSAY EVIDENCE OF PEDIGREE, WHEN ADMISSIBLE.** — The rule which admits hearsay evidence of pedigree is restricted to the declarations of deceased persons who were related by blood or marriage to the person, and were therefore in the succession in question. The testimony of a party suing as heir of his father after his death is competent evidence of his father's declarations touching the land in litigation, and the latter's declaration that he was the surviving brother and only heir of the former owners of the land is admissible in evidence. *Fowler v. Simpson*, 370.

3. **EXPERT EVIDENCE SHOULD BE RECEIVED WITH GREAT CAUTION**, and rejected by the jurors, the same as the testimony of any other witness, if after due consideration they deem it not well founded in fact. They may use their own knowledge and judgment in matters of handwriting, and are not legally compelled to follow the opinion of experts. *Haigh v. Vail*, 466.
4. **CRIMINAL LAW — PRELIMINARY EXAMINATION — NEGLECT TO INFORM ACCUSED OF HIS LEGAL RIGHTS.** — It is the duty of a justice of the peace presiding at the preliminary examination of a person charged with crime to caution the latter that statements or confessions there made by him may be used against him, and to inform him of his legal rights in the premises. Unless he is so cautioned and informed, a confession made by him at that time is not admissible in evidence on his subsequent trial. *Coffey v. State*, 525.
5. **OCCUPATION AND SALARY OF PLAINTIFF, EVIDENCE OF, WHEN ADMISSIBLE.** — Where one of the elements of damages alleged in the plaintiff's petition is his loss of his own time while attending and nursing his wife, his testimony as to his occupation, salary, and the time lost by him cannot be considered irrelevant. *Pullman P. Car Co. v. Smith*, 356.
6. **EVIDENCE AS TO CAUSE OF ILLNESS, WHEN ADMISSIBLE.** — In an action by a husband to recover damages for the sickness of his wife, alleged to have been caused by her being set off the train by the defendant's servants before it reached the station, the following testimony given by her on the trial is competent and admissible: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." *Pullman P. Car Co. v. Smith*, 356.
7. **SECONDARY EVIDENCE OF CONTENTS OF WRITINGS** is admitted on the theory that the original cannot be produced by the party by whom the evidence is offered, within a reasonable time, by the exercise of reasonable diligence. *Wiseman v. North Pacific R. R. Co.*, 135.
8. **SECONDARY EVIDENCE OF WRITING — REASONABLE DILIGENCE TO PROCURE ORIGINAL.** — A party seeking to introduce secondary evidence of a writing alleged to be lost or destroyed must show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. *Wiseman v. North Pacific R. R. Co.*, 135.
9. **SECONDARY EVIDENCE OF WRITING — DEGREE OF DILIGENCE REQUIRED** in any case, in an effort to produce an original document alleged to be lost or destroyed, in order that secondary evidence of its contents may be admissible, depends upon the character and importance of the document, the purpose for which it is expected to be used, and the place where a paper of that kind might naturally be supposed to be found. If the document is valuable and important, a more diligent search is required than if it is of little or no value, and so the purpose for which it is proposed to use it has an important bearing in determining the degree of diligence required. *Wiseman v. North Pacific R. R. Co.*, 135.
10. **SECONDARY EVIDENCE OF WRITING OUTSIDE OF STATE.** — Where the defense is based upon an alleged contract in writing, the execution and contents of which are denied, proof that it is in the possession of a person outside the state will not admit secondary evidence of its contents, in the absence of proof that proper effort has been made to obtain the

original in the place where it would be most likely to be found. *Wissman v. North Pacific R. R. Co.*, 135.

11. EVIDENCE COMPETENT AS AGAINST EITHER OR SEVERAL DEFENDANTS may be admitted against the defendant in respect to whom it is competent, and its use and application limited by proper instructions. *Consolidated etc. Co. v. Kiefer*, 628.
12. CRIMINAL LAW — CONFESSION AS EVIDENCE. — A confession made by an accused at his preliminary examination without being informed of his legal rights, or the aid of counsel, and in the presence of those to whom he had confessed the day previous under threats and fear of his life, is not admissible in evidence on his trial, in the absence of proof clearly showing that the second confession was not made under the influence inducing the first. *Coffey v. State*, 525.
13. CRIMINAL LAW — ADMISSIBILITY OF CONFESSIONS. — Before the confessions of one charged with crime are admissible in evidence against him, it must be shown that such confessions were freely and voluntarily made, and when admitted, they should be acted upon by the court and jury with great caution. *Coffey v. State*, 525.
14. CRIMINAL LAW — CONFESSIONS — PRESUMPTION. — When the confession of an accused has, in the first instance, been made under illegal influences, such influences will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown. *Coffey v. State*, 525.

See ANIMALS, 1; APPEAL AND ERROR, 17; CARRIERS, 9; CORPORATIONS, 14; COURTS, 2; CRIMINAL LAW, 6; DEEDS, 5; DEPOSITIONS; ELECTIONS; HIGHWAYS, 4; HUSBAND AND WIFE, 6; INCENT, 1, 2; INSURANCE, 5, 6, 19; JUDGMENT, 6, 16, 18-20, 24, 25; LIBEL, 2, 3; MARRIAGE AND DIVORCE, 7; NEGLIGENCE, 12, 13; NUISANCE, 1; RAILROAD COMPANIES, 4, 5, 12; RAPE; WITNESSES.

### EXCESSIVE DAMAGES.

See NEW TRIAL; RAILROAD COMPANIES, 23.

### EXECUTION.

1. EXECUTION SALE. — A JUDGMENT CREDITOR PURCHASING AT AN EXECUTION SALE IS CHARGEABLE with notice of all irregularities in the proceedings. *Smith v. Huntoon*, 646.
2. EXECUTION SALE EN MASSE, when the property sold is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular, and the sale will be set aside in equity. *Smith v. Huntoon*, 646.
3. EXECUTION SALE. — ASSIGNEES OF THE CERTIFICATE OF A SALE MADE TO THE PLAINTIFF occupy the position which he occupied, and are affected by irregularities by which he is affected. Especially are they chargeable with notice of all matters which they might have ascertained by examining the proceedings and public records upon which their title rested. *Smith v. Huntoon*, 646.
4. EXECUTION SALE. — WHILE GROSS INADEQUACY OF PRICE ALONE is not sufficient to avoid a sale under judicial process, it will, when conjoined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition. *Smith v. Huntoon*, 646.

6. AMENDMENT OF AN OFFICER'S RETURN OF A LEVY WILL BE ALLOWED AS AGAINST A GRANTEE whose deed was made for the purpose of delaying and defrauding creditors. *Jackson v. Esten*, 765.
8. AMENDMENT OF AN OFFICER'S RETURN OF A LEVY after it has been recorded will not be permitted if the rights of intervening *bona fide* purchasers are thereby impaired. *Jackson v. Esten*, 765.
7. AMENDMENTS OF THE RECORD OF AN EXTENT OF LANDS UNDER EXECUTION are permitted irrespective of the lapse of time, if in conformity to the facts and not prejudicial to the rights of third persons acquired *bona fide* and without notice, but are denied if strangers have in good faith for a valuable consideration become vested with the title, because their equity is equal to that of the creditor. *Jackson v. Esten*, 765.
8. AMENDMENTS ARE ALLOWED OR DISALLOWED as may best tend to the furtherance of justice. *Jackson v. Esten*, 765.
9. EXECUTION SALE — CONVEYANCE OF PURCHASER'S INTEREST — EFFECT OF SHERIFF'S DEED TO GRANTEE. — The sale of a purchaser's interest in land acquired by him under execution sale, before the expiration of the time for redemption, operates as an assignment of the sheriff's certificate of sale, and the subsequent execution of the sheriff's deed to the execution purchaser's grantee vests in him a perfect title. *Leonard v. Flynn*, 500.
10. VARIANCE BETWEEN A JUDGMENT AND AN EXECUTION does not render the latter void, if it is shown to be intended, issued, and enforced as an execution upon the former. *Anderson v. Gray*, 696.
11. GROUNDS FOR QUASHING. — When the execution under which a sale is made is defective in failing to follow the judgment in every essential particular except the names of the parties, and the fact appears, unexplained, that the amount realized at such sale was only about one half of what the property brought at execution sale a few months previously; the execution will be quashed, and the sale set aside. It is beyond the discretion of the trial court in such case to amend the execution and confirm the sale. *Flint v. Phipps*, 124.

See EQUITY, 5; JUDGMENT, 2, 3; LIMITATION, 2.

#### EXECUTORS AND ADMINISTRATORS.

1. STATUTE OF LIMITATIONS AS DEFENSE — TRUSTS. — Where a person during his lifetime, as executor, stands in the relation of trustee to a fund, and cannot plead the statute of limitations in respect thereto, his representatives, after his death, stand in no better position, and cannot plead the statute. *Fox v. Tay*, 474.
2. TRUST — STATUTE OF LIMITATIONS. — Where an executor receives funds belonging to the estate, and gives his co-executors a note secured by mortgage for the amount, he is a trustee of the fund, and the statute of limitations does not run in his favor until he expressly repudiates the trust; nor does the fact that he was appointed in a foreign jurisdiction affect his relation as trustee to such fund received within the jurisdiction where the trust is sought to be enforced. *Fox v. Tay*, 474.
3. ACTION TO FORECLOSE MORTGAGE BY FOREIGN EXECUTOR. — Where a foreign executor, as trustee, has taken a note and mortgage from his co-executor for a fund received by the latter as belonging to the estate, he may maintain an action to recover the fund, and to foreclose the mortgage as mortgagee, without taking out letters testamentary in the jurisdiction where the mortgaged property is situated. *Fox v. Tay*, 474.

4. **ACCOUNTING BY FOREIGN EXECUTOR.** — Where the assets of an estate situated within the jurisdiction come into the hands of a foreign executor while residing within that jurisdiction, by voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction. *Fox v. Tay*, 474.

### EXEMPTIONS.

See **STATE**, 2.

### EXPERT EVIDENCE.

See **EVIDENCE**, 3.

### FEEs AND SALARIES.

See **CORPORATIONS**, 6.

### FIRE INSURANCE.

See **INSURANCE**, 1-36.

### FISHERIES.

1. **EACH NATION HAS THE RIGHT TO CONTROL FISHERIES** on the open sea within a marine league from the coast, and within bays wholly within its territory the headlands of which are not more than two marine leagues apart. *Commonwealth v. Manchester*, 820.
2. **JURISDICTION OF STATES OVER FISHERIES IN SEAS AND BAYS ADJACENT TO THEIR COASTS OR WITHIN THEIR TERRITORY** extends to the same distance as the jurisdiction of the nation over such seas and bays. Hence each state may regulate the fisheries within such limits, subject only to such powers as Congress may exercise in the regulation of commerce, foreign or domestic. *Commonwealth v. Manchester*, 820.
3. **JURISDICTION. — THE REGULATION OF FISHERIES WITHIN THE TERRITORIAL LIMITS OF A STATE** is not a regulation of commerce, and the control of such fisheries is not included in the grant to Congress of the power to regulate commerce. *Commonwealth v. Manchester*, 820.
4. **TIDE-WATERS AND FISHERIES.** — Each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner the states own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running. Each state has the right to appropriate the tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. *Commonwealth v. Manchester*, 820.
5. **JURISDICTION OF ADMIRALTY AND OF STATE COURTS.** — The grant of judicial power to the United States, in cases of admiralty and marine jurisdiction, does not affect the jurisdiction nor the legislative power of the states over so much of their territory as lies within the limits of the state, though it may be a part of a sea or bay. Therefore, the legislature may provide regulations respecting fisheries within the state, and authorize its courts to try and punish persons who violate such regulations, provided such fisheries are within a marine league of the coast, or are within a bay the mouth of which is not more than two leagues in width. *Commonwealth v. Manchester*, 820.
6. **JURISDICTION — INTERNATIONAL LAW — FISHERIES.** — As between nations, the minimum limit of the territorial jurisdiction of each over tide-

against his property to assist in paying for such improvement; and he is also estopped from questioning the legality of such tax, whether it is legally valid or not. *Stewart v. Board of Commissioners*, 746.

2. **INJUNCTION TO RESTRAIN COLLECTION OF ILLEGAL TAX — ESTOPPEL — IMPROVEMENT OF COUNTY ROAD.** — A land-owner who signs, circulates, and presents a petition asking for the improvement of a county road contiguous to his land, who lives in the vicinity and is present at times as the work progresses, and who knows that the petition is not legally sufficient to authorize such work, is estopped from asserting its illegality as a ground of obtaining an injunction to stay the collection of a tax levied on his land to assist in paying for such improvement. *Stewart v. Board of Commissioners*, 746.
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47. A PAID-UP POLICY IN A MUTUAL LIFE IS FORFEITED by the failure to pay interest on the original policy in lieu of which the paid-up policy is issued, though the latter declares "that it shall be in full of all interest is not paid annually in advance or given for any portion of the premium on the original policy, no payment will be made, any indebtedness of the insured on this policy will first be deducted therefrom." *Ins. Co.*, 17.
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56. THE WORD "OCCUPATION," when found in the by-laws or policies of insurance companies, must be held to have reference to the vocation, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are incidentally connected with the life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, and recreation. *Union Mut. Acc. Ass'n v. Prohard*, 664.
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59. ASSESSMENTS AND AMOUNT TO BE PAID BENEFICIARY. — IF THE BY-LAWS OF A MUTUAL ACCIDENT ASSOCIATION PROVIDE that the secretary shall make an assessment of two dollars upon all members belonging at the time of the happening of the injury provided the amount in the treasury is not sufficient to pay the claim, and such amount, when collected, less ten per cent for expenses, shall be paid to the beneficiary, and shall be payment in full upon the part of the association, the beneficiary is entitled to be paid the full amount for which he is insured, if there are sufficient funds in the treasury, otherwise the sum of two dollars may be assessed against each member, and if the sum received from such investment is sufficient to pay the amount of the insurance and the expenses of collection, such amount must be paid in full, but if the sum received from the assessment is insufficient to pay the insurance in full, then the expenses of collection, not to exceed ten per cent, may be deducted therefrom. *Union Mut. Acc. Ass'n v. Prohard*, 664.
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"occasioned his death within ninety days fro  
complaint alleging that "more than ninety  
the commencement of this suit, after suffici  
at a time within the continuance of said poli  
juries effected through external, violent, an  
the intent and meaning of said policy; that  
occasioned death within ninety days from the  
and also containing an allegation that all ti  
had been complied with — sufficiently avers  
states a cause of action, and is good as ag  
*Richards v. Travelers Ins. Co.*, 455.

## INTEREST.

1. **RATE OF INTEREST, CONFLICT OF LAWS RELAT**  
borrowed in one state upon real estate situat  
interest lawful by the law of the latter state,  
the former state, and the note and deed of t  
in the state where the real estate is situated  
but are delivered and the money paid in the  
is made and in which the note is payable, t  
thereto intending to evade or violate the law,  
in reference to the law of the state in which t  
and to the rate of interest allowed there, and  
law in the construction and effect of the cont  
the courts of the latter state will not restri  
deed of trust on the ground that the cont  
*Dugan v. Leno*, 332.
2. **CITIZEN OF ONE STATE CONTRACTING DEBT W**  
**MAY AGREE TO PAY INTEREST ACCORDING TO**  
and where the parties to the contract distinc  
other facts their intention can be satisfactor  
ing it in one state rather than in the other, c  
state instead of in the other, is not of con  
question. But usury laws cannot be evade  
state whose laws shall control the contract.

See **USURY**.

## INTERNATIONAL LAW.

See **FISHERIES**, 1-4.

## INTERSTATE COMMERCE.

See **COMMERCE**.

## JOINT LIABILITY.

1. **THE NEGLIGENCE OF TWO OR MORE PERSONS**  
**SEVERAL LIABILITY AGAINST THEM** for in  
when they are acting together to accomplish

the work was apportioned among them. *Consolidated etc. Co. v. Keifer*, 688.

2. **NEGLIGENCE, WHEN JOINT.** — If A is to fix the location of a refrigerator plant and to provide a truss or support for a tank, and B, when this is done, is to erect a stand and put the tank upon the support so furnished, and A is negligent in not providing sufficient support, and B, knowing the insufficiency of such support, directs one of his employees to work upon the tank, and it falls by reason of the insufficiency of the support and injures such employee, A and B are jointly and severally answerable to him for the damage suffered by such injury. *Consolidated etc. Co. v. Keifer*, 688.
3. **LIABILITY FOR CONCURRENT NEGLIGENCE.** — When a person is injured by the concurrent and contributory negligence of two persons, one of them being at the time the common carrier of his person, both tortfeasors are liable jointly and severally to him in damages. *Bunting v. Hogsett*, 192.

### JUDGES.

1. **INTEREST WHICH DISQUALIFIES** a judge to sit in a case under the Florida statute is a property interest in the action or its result, in contradistinction to an interest of feeling, or sympathy, or bias that would disqualify a juror. *Ex parte Harris*, 548.
2. **AFFINITY WHICH DISQUALIFIES** a judge to sit in a case is the tie arising from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. There is no affinity between the kinsmen of the wife and those of the husband, and *vice versa*. Hence the husband's brother and the wife's sister have no affinity, and the same is true of the husband's brother and the wife's brother. *Ex parte Harris*, 548.
3. **FACTS WHICH DO NOT DISQUALIFY.** — The facts that a judge has boarded with his sister-in-law, who has been a frequent visitor at his home, sometimes staying there several days, and that the judge has been and is a great admirer and friend of a brother of such sister-in-law, and regards him as scrupulously honest, will not disqualify such judge from presiding at the trial of such brother for a criminal offense. *Ex parte Harris*, 548.

See BAIL; JUDGMENT, 19; TRIAL, 5.

### JUDGMENT AND DECREE.

1. **OMISSION OF INITIAL IN NAME FATAL TO LIEN.** — The omission of the middle initial of the name of a judgment debtor on the index of judgments is fatal to the lien of the judgment creditor, as against a subsequent *bona fide* grantee of such judgment debtor for value and without notice, who has searched the judgment record for the name under which his grantor held and transferred title. *Crouse v. Murphy*, 232.
2. **EXECUTION — VARIANCE.** — That a judgment was entered or an execution issued in favor of James M. for the use of G. W. H., when the only action was by Jane M. for the use of G. W. H., is not fatal to proceedings under such execution and judgment. *Anderson v. Gray*, 696.
3. **SERVICE OF PROCESS BY PUBLICATION, RECITAL OF DUE SERVICE IN JUDGMENT BY DEFAULT UPON, WHEN NOT CONCLUSIVE.** — When the recitals in a judgment by default, rendered upon service of process by publication, show conclusively that the process was never lawfully served, the

- judgment is a nullity, the court being with such judgment recites due service. *Fowler v.*
4. CONCLUSIVENESS OF. — A judgment of a court binding on the parties, no matter how erroneous if annulled. *Morrill v. Morrill*, 95.
5. FORMER DECREE HOW FAR CONCLUSIVE. — A divorce between the same parties for the same re-examination of the same facts in a subsequent enough has occurred since the rendition of the plaintiff to relief, a decree will be granted. *Farquar v. Farquar*, 93.
6. JUSTICE'S JUDGMENT — NONSUIT — RES JUDICATA. — Justice's judgment dismissing an action is not under a plea of *res judicata* to such judgment, not the merits were inquired into upon rendering. *Davis*, 71.
7. JUSTICE'S JUDGMENT — RES JUDICATA. — A judgment on the merits is conclusive on the parties, not only as to all which could or should have been. 71.
8. WHAT IS COLLATERAL ATTACK. — A collateral decree is any proceeding which is not institute of annulling, correcting, or modifying it. The same, and that plaintiff seeks to attack the reply to the answer, does not change the any the less a collateral one. *Morrill v. Morrill*.
9. WHEN BINDING IN COLLATERAL PROCEEDINGS. — opportunity to present his defense and neglect or decree against him is binding in a collateral. *Morrill*, 95.
10. JUDGMENT CANNOT BE COLLATERALLY ATTACKED. — A judgment of a court having jurisdiction and of the parties cannot be questioned collateral the record, by the parties or privies. *Morrill*.
11. JUDGMENT CANNOT BE COLLATERALLY ATTACKED. — a court has jurisdiction of the subject-matter, judgment cannot be impeached collaterally for irregularities in practice. *Morrill v. Morrill*, 95.
12. JUDGMENTS CAN ONLY BE ATTACKED BY ONE. — for fraud or collusion. *Woods v. Irwin*, 282.
13. COLLATERAL ATTACK. — From the time the entry of judgment, all steps taken by the court, can only be remedied by direct proceedings.
14. COLLATERAL ATTACK. — An inconsistency between judgment rendered by a court of record with judgment not lay such judgment open to collateral attack.
15. ORDER NUNC PRO TUNC — COLLATERAL ATTACK. — orders an entry *nunc pro tunc* of an order made by plaintiff's successor in interest as plaintiff, with to enter in the minutes, the action of the court *nunc pro tunc* is conclusive on collateral attack.
16. REOPENING — EVIDENCE. — A judgment can competent evidence as a foundation therefor.

- of limitations to one who has had his day in court, and does not allege any equitable circumstances. *Woods v. Irwin*, 282.
18. **JUDGMENT AS EVIDENCE.** — The judgment of a domestic court of general jurisdiction is conclusively presumed to be correct, and cannot be impeached when offered in evidence in another action, unless the record of the judgment shows that the court did not have jurisdiction of the subject-matter or of the person of defendant. *Crim v. Kessing*, 491.
  19. **AUTHENTICATION OF, BY SUCCESSOR OF JUDGE WHO RENDERED IT.** — A judgment need not be signed by the judge rendering it, and upon his failure to authenticate it during his term of office, it may be authenticated by his successor without impairing its effect. *Crim v. Kessing*, 491.
  20. **MINUTE ENTRY OF DECISION BY CLERK DOES NOT CONSTITUTE — TIME OF ENTRY OF JUDGMENT — STATUTE OF LIMITATIONS.** — The entry by the clerk, on the minutes of the court, at the end of the trial, of the amount which plaintiff is entitled to recover in a foreclosure suit does not constitute the judgment, when findings are not waived. When such findings are filed by the court they constitute the rendition of the judgment, which the clerk, as a mere ministerial act, could thereafter, at any time, enter at length in the record of the court. The statute of limitations does not begin to run against such judgment until it is so recorded. *Crim v. Kessing*, 491.
  21. **STATUTE OF LIMITATIONS** does not begin to run against a judgment until its entry on the record of the court. *Crim v. Kessing*, 491.
  22. **JUDGMENT BY CONFESSION ON DEBT BARRED BY LIMITATION — EFFECT ON CREDITORS.** — A judgment honestly confessed by an executor, on a debt barred by the statute of limitations, cannot be opened by the creditors of the decedent, in the absence of allegation of fraud or collusion, for the purpose of letting in the defense of the statute, although the effect of the judgment is to diminish the fund for their payment. *Woods v. Irwin*, 282.
  23. **JUDGMENT BY CONFESSION BY AN EXECUTOR** on a debt barred by limitation is not a fraud on the creditors of the decedent. *Woods v. Irwin*, 282.
  24. **LAWS OF ANOTHER STATE — JUDICIAL NOTICE** will not be taken by the courts of one state of the laws of another, and therefore, in considering the validity and effect of a judgment entered in another state, they will presume that the laws of such state are the same as those of the state in which such courts are held. *Oshorn v. Blackburn*, 400.
  25. **JUDGMENTS OF OTHER STATES.** — If the laws of another state are relied upon for the purpose of showing what faith and credit should be given to a judgment entered therein, they must be proved, like other facts. *Oshorn v. Blackburn*, 400.
- See **APPEAL AND ERROR**, 14, 18; **EXECUTION**, 9; **INFANTS**, 1, 2; **PARTITION**, 2, 3; **PAYMENT**, 2, 3; **SET-OFF**, 2; **WILLS**, 4.

## JUDICIAL NOTICE

See **SLANDER**, 5.

## JUDICIAL SALE

1. **SHERIFF'S SALE — RIGHTS OF PURCHASER.** — When a mortgage has been satisfied of record, and a judgment for the same debt is still apparently



**2. SHERIFF'S SALE—PURCHASER—NOTICE.**—  
is not bound to look into the facts of payment of  
mortgage on the property sold, or the interest thereon,  
further than they have been made accessi-  
*Meigs v. Bunting, 273.*

### JURISDICTION.

**See COURTS; DOMICILE, 1; FISHERIES**

**See EVIDENCE, 4; JUDGMENT**

See JUDGES, 1: TRIAL, 1.

**See COVENANTS; EQUITY, 2; TRADITION.**

1. **EVICITION.** — If a room and power are let together, the right to have the power furnished through the room, the throwing off of the belt by the tenant with a view to stopping the tenant's business in the room, is an eviction entitling him to recover damages he suffered thereby. *Brown v. Holyoke Water Power Co.*, 101 Mass. 212.
2. **TENANT AT WILL MAY RECOVER DAMAGES** for the loss of his room from his unlawful eviction by the latter, though the tenancy has been terminated in a short time by proper notice. *See* *Wright v. Holyoke Water Power Co.*, 844.

**3. ATTORNEY BY TENANT INVALID WHEN.**—  
 sion of land as tenant of another cannot, with  
 or giving notice to his landlord, by agreeing  
 stranger not deriving title from the same  
 nal landlord, transfer to such stranger th  
 make any difference that the land had der  
 original landlord, and that the tenant did no  
*Fowler v. Simpson*, 370.

**1. ABANDONMENT BY TENANT—RELETTING—**  
The abandonment of leased premises by the tenant before the end of the term, taking possession

wish, and the subsequent reletting of the property to another tenant, is not a surrender and termination of the first lease. In case of such reletting, the landlord is not entitled to recover for rent after the abandonment, but only compensation for the injury, and his measure of damages is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided the reletting was done in good faith. *Respini v. Porta*, 488.

5. **ABANDONMENT OF PREMISES — DAMAGES LIMITED BY PLEADINGS.** — In an action by a landlord against his tenant to recover damages for abandonment of the premises before the end of his term, the landlord's recovery is limited to the amount claimed in his pleadings, and the court cannot allow additional damages due up to the time of the breach of the lease, but not claimed in the complaint. *Respini v. Porta*, 488.
6. **ABANDONMENT OF PREMISES — ELECTION BY LANDLORD — MEASURE OF DAMAGES.** — A landlord, upon a wrongful abandonment of the leased premises by the tenant, may decline to meddle with the property, and at the end of the term sue for the rent; or, to avoid risk of damage to the property or the insolvency of the tenant, he may relet the property, and then recover, as damages against such tenant, the difference between the rent he was to receive and the rent actually received from the subsequent tenant. *Respini v. Porta*, 488.
7. **LANDLORD'S LIABILITY FOR LETTER-CARRIER INJURED ON HIS PREMISES.** — If the owner of a building lets different parts of it to tenants, but there is an open hallway in which is an elevator and also letter-boxes for the accommodation of the tenants, and the hallway does not appear to have been leased, but is always open, a letter-carrier who enters the hallway to put a letter for one of the tenants in a letter-box kept there for that purpose may be deemed to have entered the premises by the invitation or authority of the owner, and hence may recover of him if there injured through his negligence. *Gordon v. Cummings*, 846.
8. **NEGLECTENCE MAY BE IMPUTED TO THE OWNER OF A BUILDING IN THE MANAGEMENT OF AN ELEVATOR-WELL,** when the elevator itself is used by the tenants in the daytime, but at night is in charge of a servant of the owner, and while so in charge is left open and unguarded in the hallway, where it is quite dark and where are letter-boxes to receive the mail of tenants, and a letter-carrier in attempting to reach such boxes to deposit mail therein falls down such well and is injured. *Gordon v. Cummings*, 846.

See CONTRACTS, 7.

## LEASE.

**CONFLICT OF LAWS.** — If a LEASE IS VOID IN THE TERRITORY IN WHICH IT WAS MADE, and cannot support an action there, it is equally void and incapable of supporting an action elsewhere. *Holderman v. Pond*, 734.

## LEGACIES.

1. **EFFECT OF WIDOW'S ELECTION ON LEGACIES.** — Where the testator's will bequeaths the income of his estate to his widow for life, with particular and residuary legacies payable at her death, her election to take under the intestate laws, and against the will, is equivalent to her death, and its effect is to make all the legacies payable at once, in the order of their priority. In such case, particular legacies will not



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be postponed until the widow's death, in or may be paid the residuary legatees during ) to which they are entitled, and compensate cise. *Estate of Vance*, 267.

2. **RIGHTS OF DEFINITE AND RESIDUARY LEGATEE** if necessary, to preserve the intention of s but it will never interfere in favor of a res definite legatee, unless upon a plain implic siduary legatee was in fact a preferred obje *Estate of Vance*, 267.

See CORPORATIONS, 12, 15

## LIBEL.

1. **PRIVILEGED COMMUNICATION** in libel is one m from a proper motive, in a proper manner, i or probable cause. *Conroy v. Pittsburgh Tin*
2. **PRIVILEGED COMMUNICATION — PROOF OF M** where the publication is defended as privile presumption of malice arising from the pul shown by other evidence, either intrinsic, f the article, or extrinsic, as actual malice, hr able cause, or by any evidence tending to ov sumption of protection under the privilege. 188.
3. **LIBEL CHARGING INDICTABLE OFFENSE — PRE PROOF OF PRIVILEGE.** — When a publicat offense, and is libelous *per se*, the presumptio charged is *prima facie* evidence of the falsit and malice of the publication, and sufficien proof of the facts that the publication was p *Pittsburgh Times*, 188.

## LICENSE.

See COMMERCE, 2; MUNICIPAL CORPORATION

## LIENS.

See MECHANIC'S LIEN; PARTNERSHIP

## LIFE ESTATE.

See CORPORATIONS, 9, 12, 15

## LIFE INSURANCE

See INSURANCE, 40-41

## LIMITATIONS OF ACTION

1. **STATUTE OF LIMITATIONS AS DEFENSE — MA REPLY.** — Where the statute of limitations matters upon which plaintiff relies for relief be deemed to have been pleaded in his reply
2. **EXECUTION SALE — STATUTE OF LIMITATIONS** The statute of limitations does not commence

of land at sheriff's sale until the sheriff's deed has been delivered to the purchaser. *Leonard v. Flynn*, 500.

See **ARTIAL AND ENER, 11; COVENANTS; DEBTOR AND CREDITOR, 1; EXECUTORS AND ADMINISTRATORS, 1, 2; EQUIT, 4; JUDGMENT, 7, 20-23; MORTGAGE, 2; PAYMENT, 1; PLEADING, 20; TAKING, 4, 5; TRUST, 1.**

# LIS PENDENS.

See **ENJOINTMENT, 1.**

# LOTTERIES.

1. **DEFINITION.** — A scheme for the distribution of prizes by chance is a lottery. *State v. Kansas Mercantile Ass'n*, 727.
2. **"PLAYING POLICY."** — A scheme popularly and generally known as "playing policy" is a lottery. *State v. Kansas Mercantile Ass'n*, 727.
3. **SCHEME WHICH IS.** — A scheme by which an association sells certificates or tickets for a certain small sum of money, which entitle the purchaser to a lead-pencil and the right to select certain numbers which if drawn from a revolving wheel in which other numbers are placed entitle the purchaser to a sum of money much larger than the purchase price of the tickets, is a lottery, and unlawful. *State v. Kansas Mercantile Ass'n*, 727.

# MANDAMUS.

1. **DISCRETIONARY ACT.** — Where the comptroller of state is invested with the legal duty of approving or rejecting the official bonds of county officers, his approval or rejection involves the exercise of judgment and discretion, and will not be controlled by *mandamus*, except for a capricious, arbitrary, or oppressive exercise thereof. *State v. Barnes*, 516.
2. **MANDAMUS WILL LIE TO CONTROL DISCRETIONARY ACTS OF OFFICERS** only when the exercise of discretion is assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion, or when it is exercised capriciously, arbitrarily, or oppressively. *State v. Barnes*, 516.
3. **MANDAMUS WILL NOT LIE TO CONTROL DISCRETIONARY ACTS OF OFFICERS** for wrong decisions, on the ground that wrong reasons are given therefor, except when the reasons relate to matters of law not within their discretion. *State v. Barnes*, 516.

See **BUILDING ASSOCIATIONS, 2.**

# MARKETS.

See **MUNICIPAL CORPORATIONS, 9-27.**

# MARINE INSURANCE.

See **INSURANCE, 37-39.**

# MARRIAGE AND DIVORCE.

1. **DEFINITION.** — Marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex. *State v. Bittick*, 869.
2. **CONTRACT OF MARRIAGE.** — The mutual agreement of the parties to live together in the professed relation of husband and wife is essential to

create a contract of marriage, and such contract imposes upon the parties to it the obligation to live together in such relation. *Kilburn v. Kilburn*, 447.

3. **MARRIAGE BY CONTRACT.** — A valid marriage exists between the parties, where a man, and a woman under eighteen years of age whose mother refuses to consent to her marriage, making it impossible to procure a marriage license, mutually agree to marry, and publicly announce themselves as man and wife, and at the same time execute a written contract in the presence of witnesses who sign the same, by which the contracting parties agree to live together as man and wife, and this is followed by cohabitation and holding themselves out publicly as husband and wife. *State v. Bittick*, 869.
4. **MARRIAGE, WHAT CONSTITUTES, UNDER CONTRACT.** — Where an agreement to marry is not followed by solemnization, there is no assumption of marital rights, duties, or obligations, within the meaning of section 55, California Civil Code, until the commencement of cohabitation by the parties to the agreement. And by cohabitation is meant, not simply the gratification of the sexual passion, but to live and dwell together, and to have the same habitation. *Kilburn v. Kilburn*, 447.
5. **WHAT DOES NOT CONSTITUTE.** — An agreement between parties to a marriage without solemnization, not followed by anything to indicate to the community that they have assumed the relation of husband and wife, is not an assumption of the marital rights, duties, or obligations contemplated by section 55, California Civil Code, and therefore does not constitute a marriage. *Kilburn v. Kilburn*, 447.
6. **MEANING OF "MARITAL RIGHTS, DUTIES, OR OBLIGATIONS."** — The words "marital rights, duties, or obligations," mentioned in section 55, California Civil Code, providing that consent to marriage must be followed "by a mutual assumption of marital rights, duties, or obligations," mean such rights, duties, or obligations as arise from the contract of marriage and constitute its object, and therefore embrace what the parties to such contract mutually agree to perform toward each other and to society. *Kilburn v. Kilburn*, 447.
7. **DIVORCE — ADULTERY — EVIDENCE.** — In an action for divorce on the ground of adultery, where the marriage of the parties is not sought to be established by proof of their cohabitation, evidence of the alleged husband's subsequent marriage to the woman with whom he is alleged to have committed adultery is irrelevant and inadmissible. *Kilburn v. Kilburn*, 447.
8. **A PROHIBITION AGAINST REMARRIAGE CONTAINED IN A DECREE OF DIVORCE ENTERED IN ANOTHER STATE** is in the nature of a penalty, and has no force as a disability to remarry in this state, though the cause of divorce was such that had it been granted in this state the guilty party would have been prevented by its laws from contracting a second marriage. *Inhabitants of Phillips v. Inhabitants of Madrid*, 770.
9. **MARRIAGE BY COMMON LAW NOT AFFECTED BY STATUTE.** — A statute prescribing the procurement of a marriage license, and the other formalities to be observed in the solemnization of marriage, does not render marriages entered into according to the common law, but not in conformity to such formalities, void, unless the statute itself declares them so. *State v. Bittick*, 869.

See CONTRACTS, 10.

See *APPEAL AND ERROR*, 11; *COVENANTS; DEBTOR AND CREDITOR*, 1; *EXECUTORS AND ADMINISTRATORS*, 1, 2; *EQUITY*, 4; *JUDGMENT*, 7, 20-23; *MORALITY*, 8; *PAYMENT*, 1; *PLEADING*, 20; *TAKATION*, 4, 5; *TRUST*, 1.

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See CONTRACTS, 14

## MARRIED WOMEN.

See HUSBAND AND WIFE.

## MASTER AND SERVANT.

1. **DUTY ON PART OF MASTER** is to provide ordinary machinery reasonably safe for the work to be done. He need not provide such as will either insure the servant against injury, or be of the very best and newest device obtainable. If this is done, the master is not liable, though the servant is injured without fault of his own. *Augerstein v. Jones*, 174.
2. **NEGLECT — BURSTING OF MACHINERY.** — Where a servant is injured by the bursting of an emery-wheel operated by him, not shown to have been defectively constructed so as to cause the injury, the fact that the accident might have been prevented by the adoption of a different device than that in use will not charge the master with negligence. *Augerstein v. Jones*, 174.
3. **NEGLECT — LIABILITY FOR DEFECTS IN MACHINERY.** — It is not negligence on the part of the master towards his servant if a tool or machine breaks or bursts, whether from an internal original fault, not apparent when it was first provided, or from an external apparent one, produced by time and use, not brought to the master's knowledge. These are ordinary risks of the employment assumed by the servant, and which it is his duty to report to the master. *Augerstein v. Jones*, 174.
4. **MASTER'S LIABILITY IF DIFFERENT DEVICE WOULD PREVENT ACCIDENT.** — The risk to which an employer subjects his employee in the use of machinery furnished is not sufficient to impose liability upon the former, as being extraordinary in character, merely because the injury in a particular case might possibly have been prevented by adopting some different device. Mere proof of accident and such possible prevention is not the test of negligence by the master which produces legal liability. *Augerstein v. Jones*, 174.
5. **PROMISE OF MASTER TO REPAIR DEFECTIVE MACHINERY DOES NOT RELIEVE SERVANT FROM RESULT OF HIS CONTRIBUTORY NEGLIGENCE.** — The mere promise of a master to repair a defective machine or implement used in his business, and known by both to be dangerous, will not relieve the servant from the ordinary result of his own contributory negligence; and if, with knowledge that such promise has not been performed by the master, after a sufficient time has elapsed for such performance, the servant continues in the service and is injured, he cannot recover. *Gulf etc. Ry Co. v. Brentford*, 377.
6. **SERVANT JUSTIFIED IN RELYING ON MASTER'S PROMISE TO REPAIR DEFECT IN MACHINERY WHEN.** — When a master promises to repair a defect in machinery used in his business, and requests his servant to go on with the work, the latter has a right to believe that the defect will be repaired before he will be again called upon to place himself in danger from it; and if, in ignorance of the continued existence of the defect, he is subsequently injured, the master cannot be heard to say that the servant ought not to have relied on his promise. *Gulf etc. Ry Co. v. Brentford*, 377.
7. **DUTY OF SERVANT.** — After workmen have been employed, provided with tools and materials, and have actually entered upon the work, each is bound to exercise reasonable care, diligence, and skill in its performance. Each is also bound to consider and co-operate with his fellow-workmen to promote the success of the work in which they are all

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- engaged, and failing to do this, and receiving of his fellow-workman, he must let the employer pay for compensation. *Ross v. Walker*
8. **SERVANT, WHEN MUST EXERCISE JUDGMENT.** — A servant is not bound to perform all duties required of him towards his master, but must exercise judgment in the selection of a competent foreman and in directing them against each other, nor is he bound to attend to the detail of their labor. They must exercise judgment in the selection of material out of the mass furnished, and in the manner of handling it, so as to ascertain that there is no any scaffolding they erect for themselves, and that it is put upon such structures. *Ross v. Walker*
  9. **EMPLOYEE ONLY BOUND TO EXERCISE CARE.** — An employee who knew of the defect that he was to be held to have assumed the risk occasioned by the defect, is bound to exercise care in knowing the facts of his duty. *Taylor etc. Ry Co. v. Taylor*, 31
  10. **VOLUNTEER EMPLOYEE CANNOT RECOVER AS A LOW-SERVANT.** — One who assists the servant as a volunteer, cannot recover from such master through the negligence of such servant. He is not acting in furtherance of his own or of his master's business. *Bonner v. Bryant*, 361.
  11. **DUTY OF MASTER TO SERVANT.** — An employer has a duty to provide a suitable place to work, with suitable tools, with suitable materials, and with reasonable laborers with whom to work. If they are ignorant of the use of tools or machinery, it is his duty to instruct them in their use, and warn of such dangers thereto. *Ross v. Walker*, 160.
  12. **MASTER LIABLE FOR HIS AFFIRMATIVE ACTS WHICH DIRECTLY RESULTS TO HIS SERVANT.** — A master is liable for his representative's affirmative acts from which injury directly results, although the servant knew of the danger before, and still continued in his service. The affirmative act of a railway company, whose duty it is to provide an act that will imperil its servants' safety, when it does an act which prevents them from the benefit of signals known to be necessary to the safe work, the company will be liable for such injury as the cause of injury to the servants, and will be conferred upon him, although the servants had done the same or similar acts before that time. *Brentford*, 377.
  13. **VICE-PRINCIPAL,** so long as he acts in discharge of the principal's duty, the principal owes to his employees, representation that the act is the act of the principal. Beyond that, he is not as a vice-principal. *Ross v. Walker*
  14. **MASTER NOT LIABLE FOR RISKS ASSUMED BY SERVANT.** — A master is not liable for risks assumed by a servant who has sufficient capacity to take care of himself, and can properly appreciate the risk. *Hinch*

15. **MASTER LIABLE TO MINOR SERVANT FOR INJURIES FROM PERILS NOT KNOWN OR APPRECIATED BY HIM.** — A minor servant can recover from his master for injuries suffered by him from any peril which he did not know, or which he could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed. *Hinckley v. Horandowsky*, 618.
16. **DUTY OF MASTER TO MINOR SERVANT.** — A master who employs a child must look out for him, and see that he is not exposed to danger arising from the structure of building or machinery, which an operative of ordinary intelligence and experience would perceive. Notice of the danger is not enough, but the child must have sufficient instructions to enable him to avoid danger. *Hinckley v. Horandowsky*, 618.
17. **EVIDENCE NOT CONCLUSIVE AGAINST MINOR SERVANT'S RIGHT TO RECOVER FOR INJURY, WHAT.** — Proof that a minor servant had done the work in the doing of which he was injured, for some time prior to the accident, and of the number of times he had done it, may be properly considered by the jury in determining whether or not it was negligence in the master to require him to continue to do it, and also for the purpose of determining whether the injury resulted from the servant's inexperience and want of judgment, or from his own negligence; but it cannot be held to be conclusive against his right to recover. *Hinckley v. Horandowsky*, 618.
18. **RULE RELIEVING MASTER FROM LIABILITY FOR INJURY RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT NOT APPLICABLE TO CASE OF CHILD.** — A master, in order to defeat a recovery on the ground that the injury resulted from the negligence of a fellow-servant, must show not only that the injury was caused by the negligence of the fellow-servant, but also that the master had used ordinary care and prudence in employing such fellow-servant. If, however, the injured servant is a child, incapable of comprehending the risk, the rule relieving the master from liability for the negligence of a fellow-servant does not apply. *Hinckley v. Horandowsky*, 618.
19. **FELLOW-SERVANTS.** — All are fellow-servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to one another, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them. *Sherrie v. St. Joseph etc. R'y Co.*, 881.
20. **FELLOW-SERVANTS — SECTION FOREMEN.** — Where two section foremen are employed by the same railroad company, and are engaged in the same department of work, neither having any supervision or control over the other, and both being subject to the orders of one road-master, they are fellow-servants, and such company is not liable to one for an injury caused by the negligence of the other. *Sherrie v. St. Joseph etc. R'y Co.*, 881.
21. **FELLOW-SERVANTS.** — A person employed to perform any of the master's duties to his servant is not a fellow-servant of the latter while such relation exists, and, in respect to such duties and such delegation of authority, does not relieve the master from a proper discharge of such duties. *Daykareh v. Hannibal etc. R. R. Co.*, 900.
22. **FELLOW-SERVANTS — NEGLIGENCE.** — A person intrusted with a railway company's power of control of the practical business done at its round-house at the time of an accident, and also intrusted with directing the movements of the engines and employees engaged there, is the repre-



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- representative of the company, and not a fellow  
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its payment by taxation. *Mayrhofer v. I*
2. PUBLIC PROPERTY AND PUBLIC BUILDING  
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### MONOPOLY.

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1. IF A BUILDING IS PUT UPON MORTGAGED LAND BY THE CONSENT OF THE MORTGAGOR, and without the consent of the mortgagee, it becomes a part of the realty and is covered by the mortgage, and this result cannot be averted by any agreement to which the mortgagee is not a party. One who purchases the property at a sale under the mortgage acquires title to the building, though notified at the sale of the claims of another thereto. *Meagher v. Hayes*, 819.
2. GRANTEE WHO ASSUMES AND AGREES TO PAY TWO MORTGAGES made by the grantor of the lands granted undertakes to relieve the grantor not only from personal liability for the debt, but also from all liability under the mortgages, and if the grantor has such an interest in the property as to be actually damnified by the failure to remove the mortgages, he may recover his actual damages, notwithstanding he has been relieved from personal liability upon the debt. *Rice v. Sanders*, 804.
3. LIABILITY OF GRANTEE FOR NOT DISCHARGING MORTGAGES. — If a grantee agrees to pay two mortgages made by the grantor, and failing to pay the one which first falls due, the property is sold thereunder and the mortgage thereby paid, the grantor is entitled at once to maintain an action for the failure to pay the mortgage, though the second mortgage is not yet due, because it was the duty of the grantee, by paying off the first mortgage, to make the security of the second good, and thus to keep the grantee harmless against the covenants therein made, and the measure of damages may be the amount of the second mortgage. *Rice v. Sanders*, 804.
4. POWER OF SALE IN MORTGAGE, WHO MAY EXECUTE. — A power of sale given to a mortgagee can be executed only by him, if there has been no transfer of the debt so as to pass the legal title thereto; but if the debt has been legally assigned, the assignee is the one authorized to make the sale. *Sanford v. Kane*, 602.
5. ASSIGNMENT OF MORTGAGE OF REAL ESTATE DOES NOT TRANSFER LEGAL OWNERSHIP. — A mortgage of real estate is not negotiable or commercial paper, either at common law or under the Illinois statutes, and an assignment of it does not convey or transfer the legal ownership. The right acquired by such an assignment is an equitable right only, and a sale made by the assignee, under a power of sale given by the mortgage to the mortgagee, is void. *Sanford v. Kane*, 602.

See EXECUTORS AND ADMINISTRATORS, 3; JUDICIAL SALE; PAYMENT, 2, 3; CHATTEL MORTGAGE.

### MUNICIPAL CORPORATIONS.

1. DEFECTIVE SIDEWALK — LIABILITY FOR INJURY. — Where defects in a sidewalk on the streets of a city are known to the officers having charge of the streets, or have existed for such length of time that they could have been known to them by the exercise of ordinary care and diligence, the city is liable in damages to one who is injured by reason of such defects, without fault or negligence on his part. *Kansas City v. Bradbury*, 731.
2. LIABILITY FOR INJURY ARISING FROM DEFECTIVE AND UNGUARDED STREET. — One who, in approaching a public street over private property which he has no right to use as a traveled way, and over which the city has no control, is precipitated over an embankment into an

20. **MARKETS.** — **GRANT OF AUTHORITY TO REGULATE VENDING OF MEATS,** etc., is one of police power to be exercised upon considerations referable to the public health, and welfare of the community, and not so as to create a monopoly, but so as to afford the same rights to all alike, upon the same conditions. Under such authority, the hours of the day, and the mode or manner of and rules for conducting the business may be designated and prescribed, and the establishment of fixed places of sale may be prohibited in localities from which their exclusion is dictated by sanitary considerations. *Jacksonville v. Ledwith*, 558.
21. **MARKETS.** — **POWER TO ESTABLISH MARKETS CANNOT BE USED** to create a monopoly of the right to sell, and the right to sell at markets must be secured to all alike on the same conditions. *Jacksonville v. Ledwith*, 558.
22. **MARKETS.** — **GRANT OF AUTHORITY TO REGULATE VENDING OF MEATS** and vegetables will permit a city to ordain general regulations, applicable to all alike, as to when and where those articles may be sold; but such grant is not one conferring the franchise of establishing a market, and only a power to regulate the sale of articles which but for it could be sold anywhere and at all times. *Jacksonville v. Ledwith*, 558.
23. **MARKETS.** — **LICENSE TO SELL DOES NOT CONSTITUTE.** — A license to sell meats or other things is not a grant to maintain a market, within the meaning of a legislative grant of power to establish and regulate markets. *Jacksonville v. Ledwith*, 558.
24. **MARKET.** — **RIGHT TO LICENSE** a market, no power being given to also tax it for revenue, gives a municipal corporation power to impose such charge for the license as will cover not only the necessary expenses of issuing it, but also the additional labor of officers and other expenses imposed by the business, but nothing beyond this limit. *Jacksonville v. Ledwith*, 558.
25. **MARKETS.** — **POWER TO ESTABLISH AND LICENSE.** — Power granted to a city to establish and regulate a market includes power to license the keeper thereof. The license fee exacted is not, however, a tax for revenue, but a charge under the police power. *Jacksonville v. Ledwith*, 558.
26. **MARKETS ARE NOT SUBJECT, AS OCCUPATIONS, TO TAXATION** for revenue under charter power given a city to levy and collect taxes for the purposes of revenue upon "all property and privileges taxable by law for state purposes," and to license, tax, and regulate certain named occupations, "and all other privileges taxable by the state." The word "privileges," as thus used, means only other occupations of like kind as those designated, and not a technical privilege or franchise such as a market. *Jacksonville v. Ledwith*, 558.
27. **MARKETS.** — **POWER TO ESTABLISH AND REGULATE, MUST BE STRICTLY FOLLOWED, AND CANNOT BE DELEGATED.** — Where the power to establish and regulate markets is confined by the grant of power to the deliberative judgment or discretion of the law-making power of the municipality, the grant must be strictly followed, and the power cannot be delegated to the judgment or discretion of one constituent element of such municipal power, nor to the judgment or discretion of others. *Jacksonville v. Ledwith*, 558.

See ASSIGNMENT, 2; NEGLIGENCE, 5; TAXATION, 1; TOWNS.

## NAMES.

See JUDGMENTS, 1; TRADE-MARKS, 1, 2.

## NAVIGATION.

See FISHERIES, 7, 8.

## NEGLECTENCE.

1. **PROXIMATE CAUSE.** — In cases where negligence is alleged, the question of proximate cause is ordinarily for the jury; but when the facts are not in dispute, the question is for the determination of the court. *Bunting v. Hogsett*, 192.
2. **PROXIMATE AND REMOTE CAUSE.** — To hold a party liable for negligence, there must be a causal connection between the injury and the negligence, and such causal connection must be uninterrupted by the interposition of any independent human agency. *Curtin v. Somerset*, 220.
3. **PROXIMATE CAUSE.** — One guilty of negligence is deemed to have foreseen, and is liable for, all consequences which may naturally ensue therefrom without the intervention of some other independent agency, although, in advance, the actual result might have seemed improbable. *Bunting v. Hogsett*, 192.
4. **PROXIMATE CAUSE.** — In actions involving questions of negligence and proximate cause, the inquiry is based on whether or not there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In the absence of such cause, an act of negligence is considered the proximate cause of all injury resulting therefrom. *Bunting v. Hogsett*, 192.
5. **SELECTION OF DANGEROUS ROUTE, WHETHER JUSTIFIABLE OR NOT, TO BE LEFT TO JURY.** — If there are two routes from a party's residence to his place of destination, one dangerous and the other entirely safe, and he sees fit to select the dangerous one, it cannot be determined as a matter of law that he was justified in making such selection, but the question must be left to the jury. While he may not be obliged to take a less convenient route, which is safe, his failure to do so will present a question of fact whether, in the selection of a route known to be dangerous, he was in the exercise of ordinary care for his safety. *Sandwich v. Dolan*, 598.
6. **INSTRUCTION AS TO, WHEN SUFFICIENT.** — It is sufficient for the court to state, in its charge to the jury, the law of negligence as applied to the facts of the case, without giving any abstract definitions of negligence, gross negligence, or contributory negligence. *Taylor etc. Ry Co. v. Taylor*, 316.
7. **UNNECESSARY CHARGE, REFUSAL TO GIVE, NOT ERROR.** — Where a statute provides that a person suing for the death of another cannot recover unless the deceased, if living, could recover, it is not necessary to charge the jury to that effect, and it is not error to refuse to do so. *Taylor etc. Ry Co. v. Taylor*, 316.
8. **TRESPASSER.** — To enable a trespasser to recover for an injury, in addition to negligence, he must show that the injury was wantonly or intentionally inflicted on him by the defendant. *Rodgers v. Lees*, 250.
9. **CHILD AS TRESPASSER.** — Where a mill-owner maintains a cable for hoisting goods, at the end of which is a ball and hooks for attaching them, and a boy six or seven years of age, who has no right on the premises, disregarding a warning, gets upon the ball while the cable is in motion, with the intention and for the express purpose of riding up on the ball, and in consequence thereof is killed, he is a trespasser, and there can be no recovery against the mill-owner for the injury. *Rodgers v. Lees*, 250.

10. CHILD AS TRESPASSER. — A child of tender age as to bar recovery for his injury or death, that negligence cannot be imputed to him.
11. BURDEN OF PROOF NOT UPON PLAINTIFF WHERE NEGLIGENCE, there is no defect in the plea upon the facts are clearly submitted to the jury to charge the jury that the burden of proof to establish negligence on the part of the defendant. *Taylor*, 316.
12. EVIDENCE. — In an action to recover for personal injury, evidence as to the number and age of the child is inadmissible. *Dayharsh v. Hannibal etc. R.*
13. FACTS REDUCING DAMAGES. — Where a plaintiff for personal injuries caused by negligence, is Bright's disease of the kidneys, not caused by the negligence, that fact into consideration in determining the amount of damages and loss of earning power. *Bunting v. Hogan*.
14. NAVIGATOR IN PUBLIC WATERS IS ANSWERABLE FOR NEGLIGENCE. — A vessel upon the navigable waters, and cannot escape liability by proving negligence maliciously or wantonly. *Wright v. Mulvaney*.
15. NAVIGATOR IS LIABLE TO A FISHERMAN FOR NEGLIGENCE. — A steam-tug, when they were not in the usual course of the tug a considerable distance from the course of the tug, after the nets were seen so as to avoid them, though the navigator could have done so maliciously or wantonly, but not negligently. *Wright v. Mulvaney*, 393.
16. CONTRIBUTORY NEGLIGENCE. — The fact that a child was on a steam-tug ran over their heads other than that implied by their presence, does not bar recovery, that they were guilty of contributory negligence proper that such negligence be submitted to the jury. *Mulvaney*, 393.
17. THAT THE NEGLIGENCE OF A THIRD PARTY IN PRODUCING THE INJURY IS NO DEFENSE. — *Co. v. Keifer*, 688.
18. CONTRIBUTORY NEGLIGENCE. — IF THE CHILD IS OF AGE permit him to go upon a crowd by no one but his brother and sister, aged respectively nine months, and five years and fourteen days, and his father, fifty minutes before the latter the child is run over wholly or partly through the negligence of the child, such care as an adult person of ordinary prudence under like circumstances, the injuries must be imputed to the negligence of the child, and no recovery can be had therefor.
19. CHILD, CONTRIBUTORY NEGLIGENCE OF PERSONS. — A child is too young to be capable of taking care of his proper custodian to care for him; and if injuries caused by the negligence of another, in the absence of negligence, that negligence is imputed to the child.

See ANIMALS, 3; APPEAL AND ERROR, 11; CARRIERS, 2, 4, 5, 10, 21; CONTRACTS, 17; FISHERIES, 6; HIGHWAYS, 4; JOINT LIABILITY; LANDLORD AND TENANT, 7, 8; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

## NEGOTIABLE INSTRUMENTS.

See BILLS AND NOTES.

## NEW TRIAL.

VERDICT NOT EXCESSIVE WHEN. — A verdict for five hundred dollars will not be set aside as excessive where there is testimony to sustain it, and the testimony on the other side is not necessarily in conflict with that testimony. *Gulf etc. Ry Co. v. Wilson*, 345.

## NONSUIT.

See JUDGMENT, 6.

## NOTICE.

See EXEMPTION, 1, 3; JUDICIAL SALE, 2; TAXATION, 2-4.

## NUISANCES.

1. EVIDENCE. — In an action to recover damages for an alleged nuisance, owners and occupants of property in the same neighborhood may be permitted to testify that they were annoyed and injured by the same nuisance. Such evidence is admissible, both to show the extent and character of the injury sustained by the plaintiff, and that the business objected to as a nuisance was capable of inflicting the injury complained of. *Wylie v. Elwood*, 673.
2. ONE WHO SUSTAINS, BY REASON OF A PUBLIC NUISANCE, A SPECIAL DAMAGE DIFFERENT from that which is common to all may maintain an action for such damage, though there are many other persons injured to the same extent as himself. *Wylie v. Elwood*, 673.
3. A NUISANCE MAY BE BOTH PUBLIC AND PRIVATE AT THE SAME TIME. Therefore, though the maintenance of a coal-shed and the operating of machinery therein may injuriously affect the occupants of many houses and stores, and constitute a public nuisance, yet an action may be maintained by a private person for damages resulting to him from coal-dust falling upon the furniture, food, and clothing in his house, and the noise of the machinery, deafening him in his dwelling and disturbing the rest and quiet of his home, though numerous other persons suffer similar injuries and annoyances from the same cause. *Wylie v. Elwood*, 673.
4. RIGHT TO MAINTAIN A NUISANCE BY A RAILWAY CORPORATION so as to injure and annoy the occupants of adjoining land will not be implied from the grant to such railway of the land on which such nuisance is constructed and operated, when, under the constitution and laws in force when the grant was made, there could not be allowed in condemnation proceedings any damages for lands not taken. A simple grant of land to a railway will not be presumed to have been intended to have any greater effect than a condemnation judgment. Hence if the grantor retains lands adjacent to those granted, he or his successor in interest has the same right to recover for the use of the lands granted injurious to the lands retained, as if no grant had been made to

the railway and its rights were based upon *Wylie v. Ethwood*, 673.

5. **NUISANCE CREATED BY A RAILWAY CORPORATION** cannot, many years after the construction, with machinery worked by steam-power of a city, and so operated as to make a g scatter dust and dirt and destroy the comfort the occupants of adjoining property. *Wylie*
  6. **A BUSINESS WHICH IS NOT A NUISANCE FROM REASON OF THE PARTICULAR LOCALITY** in v a coal-shed is located in the heart of a city, dwellings, and so operated as to make grati to scatter dust and dirt, to the injury and of adjoining property. *Wylie v. Ethwood*, 673.
  7. **STABLE AND CARPET-CLEANING ESTABLISHMENT** hood devoted to private residences, and re and home uncomfortable by the dust and m cess of cleaning, and from the stench arisin sence, and may be enjoined. *Rodenhansen v*
  8. **FACTS WHICH MAY CONSTITUTE DEFENSE.** — determined is whether or not a certain basi the character of the location where the bu nature and importance of such business, been in operation, the capital invested, growth and prosperity of the community, as ured by the jury, and may constitute a de justify the maintenance of a nuisance after *Commonwealth v. Miller*, 170.
  9. **ACTION FOR INJURY FROM, NOT BARRED BY WHEN.** — Where a nuisance is not perma dents and contingencies, so that it is successive actions may be brought for inju occurs; and an action for such injury will of limitations, unless the full period of the injury before suit. But if the nuisance is recovery for the entire damage resulting fr suit. *Austin etc. R'y Co. v. Anderson*, 359.
- See **ANIMALS**, 2; **APPEAL AND ERROR**, 20; **R**

## OFFICE AND OFFICER

1. **USURPER, WHEN BECOMES OFFICER AS TO THE** the acts of a usurper who takes possession o may continue to act for so long a time and to afford a presumption of his right to act. to the public and third persons, but he has ceeding against himself. *State v. Taylor*, 51.
2. **OFFICER DE FACTO.** — To constitute a perso must at least be some colorable election on tion into office. *State v. Taylor*, 51.
3. **OFFICIAL BONDS—LIABILITY OF SURETIES.** Where the treasurer of a board of education taking possession of his office, and subsequent of education, gives an additional bond, conta

the first, but with different sureties, the sureties on both bonds are properly joined with such treasurer in an action to recover school money which he refuses to turn over to his successor upon the expiration of his term of office; and the board of education, and not his successor, is the proper party plaintiff in such action. *Gilbert v. Board of Education*, 700.

4. **OFFICIAL BONDS—CONSIDERATION.** — Where the treasurer of a board of education gives an official bond upon taking possession of his office, and is subsequently ordered to give a second and additional bond, because of the insufficiency of the first one, the insufficiency of the first bond is sufficient consideration for the giving of the second. *Gilbert v. Board of Education*, 700.
5. **OFFICIAL BONDS—LIABILITY OF SURETIES ON TWO BONDS.** — Where the treasurer of a board of education gives an official bond, and afterwards, under order of such board, gives a second bond, with different sureties, and, being general manager of a private corporation, with control of its funds, he deposits both the school and corporate funds in bank, with the knowledge of the bank that such funds are subject to his checks for corporation as well as school purposes, and a deficit exists in the school funds so deposited at the time of the execution of the second bond, the sureties on both bonds are jointly liable for any deficit in deposits of school money subsequently made and remaining unpaid at the expiration of such treasurer's term of office, if he, as manager of the corporation, has deposited sufficient of its money, subsequent to the execution of the second bond, to make good the deficit in school money existing prior thereto. *Gilbert v. Board of Education*, 700.

See CARRIERS, 11; ELECTIONS, 3; EXECUTION, 5, 6; MANDAMUS.

#### OFFICIAL BONDS.

See OFFICE AND OFFICERS, 3-5.

#### OLEOMARGARINE.

See CRIMINAL LAW, 2.

#### ORDINANCES.

See MUNICIPAL CORPORATIONS.

#### PARENT AND CHILD.

1. **LIABILITY OF FATHER FOR TORTS OF CHILD.** — A father is never liable for the wrongful acts of his minor child, unless they are committed with the father's consent or in connection with the business of the latter. *Smith v. Davenport*, 737.
2. **EARNINGS OF MINOR SON, UNTIL EMANCIPATED, BELONG TO HIS FATHER,** and the creditors of the latter have the same right to look to them and to the property in which they are invested as to any other effects of their debtor. *Schuster v. Bauman J. Co.*, 327.

See INFANTS, 2.

#### PAROL EVIDENCE.

See CONTRACTS, 12; EVIDENCE; SALES, 1, 2.

#### PARTIES.

See INSURANCE, 31; PLEADING, 10; TRIAL, 4; WILLS, 1.



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### PARTITION.

1. **PARTITION BETWEEN TENANTS IN COMMON** — Where partition between tenants in common is made by means of deeds mutually executed, the deeds do not destroy the real estate, but simply designate the share of each tenant, and all severalty; nor do the deeds operate as an assignment of the extent of the interest of each tenant in common. *Ray v. Ray*, 57.
2. **JUDGMENT IN PARTITION — CONCLUSIVENESS** — A judgment is conclusive between the parties, as to the fact that they are tenants in common. Each tenant is barred from attempting to show in another proceeding that the premises adversely to his co-tenant, or that the partition was made at the date of the rendition of the decree is erroneous. *Will*, 95.
3. **JUDGMENT IN PARTITION — COLLATERAL ATTACK** — A partition is made by one referee, instead of three. The irregularity cannot be inquired into in a collateral proceeding. *Morrill v. Morrill*, 95.

### PARTNERSHIP.

1. **ASSUMPTION BY A PARTNERSHIP OF A DEBT** — It is not a fraud upon the partnership creditors to assume a debt not a fraud upon the partnership creditors, if the partnership is able to pay its other debts at the time. *Hage v. Campbell*, 422.
2. **PARTNERSHIP, ASSUMPTION OF DEBT BY.** — A partner's signature in the books of a partnership a credit for moneys advanced to the partnership, or to give any security for such money, or to when it should be repaid, are circumstances to be considered in determining whether such loan was intended to prevent it from becoming a valid partnership debt. It is sufficed that it was made in good faith and for the benefit of the partnership. *Hage v. Campbell*, 422.
3. **ONE PARTNER MAY SECURE A FIRM DEBT**, in the name of the firm, and without his knowledge and consent, in the name of the firm upon its personal property. *Hage v. Campbell*, 422.
4. **PARTNER CANNOT PLEDGE PARTNERSHIP PROPERTY FOR HIS PRIVATE DEBTS.** *Oliphant v. Markham*, 863.
5. **PRIORITY OF PARTNERSHIP CREDITORS** — Partnership creditors have a primary and exclusive claim upon partnership assets of bankrupt or insolvent partner. *Hage v. Campbell*, 863.
6. **PRIOR LIEN OF PARTNERSHIP CREDITOR** — It is only when the dissolution of a partnership, or the death of a partner, or the bankruptcy of a partner, that an equitable lien of the partnership creditors exists upon the joint fund and no solvent partner, an exception. *Hundley v. Farris*, 863.
7. **PRIORITY OF PARTNERSHIP CREDITORS.** — The partnership property is to be satisfied out of the firm property is no exception. Partnership, or the death of one member of a partnership, merely prescribing methods of procedure in

a statute requiring all joint contracts to be considered as joint and several and making provision for suit against any one or more of those liable. Such statutes confer no additional rights on partnership or on individual creditors, and do not affect or vary the equitable priorities of partnership creditors. *Hundley v. Farris*, 863.

4. PRIORITY OF INDIVIDUAL CREDITORS. — Individual creditors of a partnership have the exclusive and primary right to have their debts satisfied out of the separate property of the individual partners. *Hundley v. Farris*, 863.

See ASSIGNMENT, 3; INSURANCE, 17.

### PARTY-WALL.

1. ONE WHO HAS BUILT two houses having a common wall between them afterwards conveys them to different persons by conveyances in which each parcel is described as terminating at a line which is in fact in the center of the wall, though the wall is not mentioned, such conveyances put upon each wall the burden and the privilege of a party-wall. *Carlton v. Blake*, 818.

### PAYMENT.

1. PAYMENTS, APPLICATION OF. — A creditor may apply a payment to any debt which he may choose, where the debtor has not directed such application, and this rule continues though the debt has been barred by the statute of limitations. *Blake v. Sawyer*, 762.
2. PAYMENT AS TO THIRD PARTY. — A judgment on a bond and a mortgage given for the same debt are distinct and separate securities, and as against the rights of third persons the payment of either extinguishes the debt and satisfies the other. *Meigs v. Bunting*, 272.
3. JUDGMENT ON BOND AND MORTGAGE — PRESUMPTION OF PAYMENT AS BETWEEN PARTIES. — A judgment on a bond and a mortgage given for the same debt are so far parts of the same transaction that the satisfaction of one is presumed to be a payment and satisfaction of the other, as between the parties, and puts the burden of proof on the creditor to show a different intent, or that the debt is not actually paid. *Meigs v. Bunting*, 272.

See DEBTOR AND CREDITOR, 1, 2.

### PEDDLERS.

1. SALE OF ARTICLES MADE IN ANOTHER STATE — RIGHT TO ENFORCE LICENSE. — One who goes from place to place in a state soliciting the sale of and selling sewing-machines, which are made by and are the property of a citizen of another state, is a peddler, from whom a license may be exacted by the state in which the machines are sold; and upon a failure to obtain such license, he is liable to the penalty imposed by statute therefor. *State v. Emert*, 874.

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2. DECLARATION CONTAINING ONE GOOD COUNT GENERAL VERDICT. — Where a declaration is sufficient to sustain a general verdict, counts are defective. *Shreffler v. Nadelhoffer*.
3. DISMISSAL OF COUNT OF COMPLAINT CARRIES — PLEADING OVER AFTER DEMURRER OVERRULLED IN ARREST OF JUDGMENT. — Where a declaration, and, after his demurrer is overruled, is precluded from insisting upon a motion in sufficiency in the declaration. *Shreffler v. Nadelhoffer*.
4. GENERAL DEMURRER WILL NOT REACH DEFENSIBLE DAMAGES WHEN. — In an action to recover damages, if the petition is sufficient for the claim, a defect therein in stating a claim for, except as reached by a general demurrer. *Taylor etc.*
5. GENERAL DEMURRER TO ANSWER PROPERLY CARRIES. — A general demurrer is interposed to an answer presents a valid defense to the suit, either the demurrer should be overruled. *Oliphant v. Nadelhoffer*.
6. DEMURRER TO BILL for want of equity, if there is any ground of equitable relief, if there are any number of grounds of special defense. *Ciyar Mfg. Co. v. Gato*, 537.
7. UNNECESSARY ALLEGATION IN PLEADING MAY BE REJECTED. — A replication presents a sufficient reply to an answer and also contains a further allegation which may be disregarded as mere surplusage. *Peck*, 610.
8. NECESSITY OF FORMAL ISSUE WAIVED BY GOING TO TRIAL. — Where a defendant goes to trial without objecting to an answer which has not been answered, and without moving for want of a replication, he thereby waives issue on that plea, and the irregularity is cured. *Nadelhoffer*, 626.
9. SUIT TO ESTABLISH WILL — PARTIES — ANSWER. — When an action to establish a rejected will is brought. *AM. ST. REP.*, VOL. XXIII — 63.

of an unincorporated church society, and the petition is dismissed for want of capacity in the plaintiff to sue, members of such church, suing in their own behalf as well as in behalf of all members, may be substituted as plaintiffs by amended petition. Such amendment introduces no new cause of action, and relates back to the commencement of the suit, so as to arrest the running of the statute of limitations. *Lilly v. Tobbsen*, 887.

10. DEFECTIVE STATEMENT OF CAUSE OF ACTION CURED BY GENERAL VERDICT. — Where only the statement of a plaintiff's cause of action is defective or inaccurate, the defect is cured by a general verdict in his favor; but where no cause of action is stated, the omission is not cured by verdict. *Sareffler v. Nadelhoffer*, 628.

See APPEAL AND ERROR, 16; INSURANCE, 59, 60; LANDLORD AND TENANT, 5; LIMITATIONS OF ACTIONS, 1; RAILROAD COMPANIES, 29, 30; SALES, 2; SLANDER, 3-7.

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shops, and switches to enable it to prop  
which can have little or no reference t  
operated as street-railways propelled by  
and intended to accommodate local conve  
of passengers, does not authorize such r  
property for a right of way. *Thompson*  
86.
2. **EMINENT DOMAIN — MEASURE OF DAMAGE**  
for the taking of land for railroad purpose  
value of the entire lot as it was just before  
what is left after the taking. *Harris v. S*

3. **EMINENT DOMAIN—ELEMENTS OF ESTIMATION OF VALUE.**—The value of part of a lot of land at the time of the taking for railroad purposes is the value as it was, not as it might have been with improvements; and the value of the rest of the lot after the taking is its value as it then is, not as it is when improved; and both values, before and after the taking, are the general market values of the particular lot, considering such advantages or disadvantages as are special and peculiar to it, without reference to the general rise or fall common to it, with other property in the neighborhood, consequent upon the coming of the railroad. *Harris v. Schuylkill etc. R. R. Co.*, 278.
4. **EMINENT DOMAIN—ELEMENTS OF ESTIMATION OF DAMAGES—EVIDENCE.**—The presence of a sewer on land taken for railroad purposes is a fact affecting the condition and value of the land at the time of the taking, and whether or not the sewer was removed by the railroad company as a necessary result of the construction of the road, or by a city in cessation of a trespass, are also facts for the consideration by the jury in estimating damages. Consequently a record in ejectment by the lot-owner against the city tends to establish a trespass in maintaining the sewer, which it is bound to discontinue, and it is therefore admissible on the issue as to whether or not the sewer was removed by the city. *Harris v. Schuylkill etc. R. R. Co.*, 278.
5. **EMINENT DOMAIN—ESTIMATION OF VALUE—EVIDENCE.**—In estimating the value of land before the taking for railroad purposes, its possible and probable uses are important elements, and may be shown by the opinions of experts; but the details of improvement, cost, or probable rental value afterwards are not admissible as independent facts; still, they ought to enter into the view of the expert in forming his opinion, and whether they have done so or not is a legitimate subject of cross-examination. *Harris v. Schuylkill etc. R. R. Co.*, 278.
6. **EMINENT DOMAIN—ERECTION OUTSIDE OF LAND TAKEN CANNOT BE SET OFF AS IMPROVEMENT.**—The erection of a bulkhead by a railroad company, entirely outside of land taken as a right of way, cannot be claimed to be an improvement and benefit to the property, in order to reduce damages in an action to recover for its erection, unless authority is shown for erecting it. An agreement on the part of the land-owner that it shall be erected without cost or expense to him does not constitute such authority. *Harris v. Schuylkill etc. R. R. Co.*, 278.
7. **CULVERTS AND SLUICES—DUTY OF RAILWAY COMPANY TO CONSTRUCT.**—In Texas, railway companies are by statute required, in constructing their tracks, to construct all necessary culverts and sluices required by the natural lay of the land, to prevent surface water from being diverted from its natural and usual course and thrown upon land, where it would not otherwise have gone. *Austin etc. R'y Co. v. Anderson*, 350.
8. **INSTRUCTIONS PROPERLY REFUSED.**—A railway company, bound by law to so construct its road as not to divert the natural flow of surface water from its usual course, to the injury of adjacent lands, is not entitled to have the jury charged that "if the road-bed was constructed as as to let the water pass with as little injury to plaintiff as could be practically done without making the road insecure, then the defendant company would not be liable for injury from water-action after it left the right of way." *Austin etc. R'y Co. v. Anderson*, 350.
9. **DAMAGE FROM SURFACE WATER DIVERTED BY RAILWAY EMBANKMENT—LIABILITY OF COMPANY FOR.**—Where a railway embankment and cul-

verts divert surface water from its natural and usual course, and cause it to flow over a party's land, and permanently injure the same, and destroy his crops, the company will be liable for the injury so caused. But it will not be liable for any injury that would have resulted to the land by reason of the natural flow of the water, had the embankment and culverts not been built. *Austin etc. R'y Co. v. Anderson*, 350.

10. **CAUSE OF ACTION FOR NUISANCE DOES NOT ACCRUE UNTIL INJURY SUSTAINED WHEN.** — Where a railroad embankment and culverts do not of themselves constitute a nuisance nor an invasion of a party's rights, not being put on his land, and only become a nuisance at intervals by diverting water from rainfalls from its usual flow upon his land, a cause of action does not accrue to him until the injury is sustained. *Austin etc. R'y Co. v. Anderson*, 350.
11. **RAILWAY COMPANY PERMITTING ITS ROAD TO BE DEFECTIVE CHARGEABLE WITH NEGLIGENCE.** — A railway company that permits its road-bed, track, or bridges to become so defective and out of repair as to render the operation of its trains over the same more dangerous to its employees than is reasonable and proper is guilty of negligence. And a court may, without saying anything about negligence, instruct the jury that if a railway company permits its road-bed and track to become unreasonably dangerous to its employees, a recovery may be had against it. *Taylor etc. R'y Co. v. Taylor*, 316.
12. **CONDITION OF RAILWAY TRACK, EVIDENCE OF, WHEN ADMISSIBLE.** — In an action to recover for injuries received in a railway wreck, evidence tending to show the condition of the track and road-bed immediately before and at the time of the wreck, at places other than where the wreck occurred, is admissible. *Taylor etc. R'y Co. v. Taylor*, 316.
13. **LIABILITY OF RAILWAY COMPANY FOR NEGLIGENCE WHILE IN HANDS OF RECEIVERS.** — A railway company is liable for personal injuries received through negligence of its employees while it is in the hands of a receiver under substantially the same state of facts as was shown in the case of *Texas Pac. R'y Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60. *Texas etc. R'y Co. v. Miller*, 308.
14. **PERSONS TRAVELING UPON RAILROAD TRACKS AS HIGHWAYS ARE GUILTY OF GROSS NEGLIGENCE,** and the railroad company is responsible only for willful or wanton injuries to them, or for injuries resulting from a degree of negligence equivalent thereto. The company does not owe to such persons the duty to furnish flagmen or to ring a bell. These are for the benefit of those about to cross railroad tracks. *Roden v. Chicago etc. R'y Co.*, 585.
15. **NEGLECT—PROXIMATE CAUSE.** — A railroad engineer, whose negligence is about to cause a collision, is justified in leaping from his engine to save his life, in any criminal aspect of the case, even though, in doing, he puts in jeopardy the lives of others; but he or his employer is liable in damages for an injury to a third person caused by a collision resulting from the engineer's primary negligence, and rendered proximate by his leaping from his engine. *Bunting v. Hogsett*, 192.
16. **INSTRUCTION ASSUMING FACT NOT PROVEN IS ERRONEOUS.** — Instruction against a railway company to recover damages for personal injuries, a charge to the jury assuming that a person not shown to be representative of the company would bind it by his promise to extinguish of an electric light not furnished nor controlled by the company, is erroneous. Nor, under such circumstances, should

- instructed that his negligence was the negligence of the company, or his promise its promise. *Gulf etc. R'y Co. v. Brentford*, 377.
17. **CONTRIBUTORY NEGLIGENCE, WHAT CONSTITUTES.** — In an action brought by a wife against a railway company to recover damages for the death of her husband, a charge to the jury that if the deceased was guilty of contributory negligence the plaintiff could not recover, and that in riding on the train of the defendant it was the duty of the deceased to conduct himself as a man of ordinary prudence and care would have done under the circumstances in which he was, and if he failed to use such ordinary care, and by so doing brought about or contributed to his own death, he would be guilty of contributory negligence, correctly states the law. *Taylor etc. R'y Co. v. Taylor*, 316.
18. **RISKS NOT ASSUMED BY EMPLOYEE OF RAILWAY COMPANY.** — A railway employee traveling to his work over a part of the company's road, where he owes no duty of inspection, does not assume risks from defects in the road-bed, track, or bridges which render his employment more hazardous than is reasonable. It is the duty of the company to keep its road in a reasonably safe condition, and every employee has the right to assume that a part of the road which he is not required to inspect or repair is in such condition. *Taylor etc. R'y Co. v. Taylor*, 316.
19. **COMMON CARRIERS — ORDER AND BURDEN OF PROOF IN CASE OF LOSS.** — In an action against a railroad company to recover for goods lost by it as a common carrier, the burden of proof is first on the plaintiff to show delivery and acceptance of the goods to be carried, and secondly, the loss and the value thereof. The burden is then shifted on the carrier to disprove these facts by a preponderance of evidence, or that the loss was occasioned by the act of God or the public enemy, or that the goods contained, in their nature, elements of destruction occasioning their loss. *Sacannah etc. R'y Co. v. Harris*, 551.
20. **DUTY OF RAILWAY COMPANY TO USE GREATEST CARE IN PROVIDING FOR SAFETY OF PASSENGERS.** — It is the duty of a railway company to use such means and foresight in providing for the safety of passengers as persons of the greatest care and prudence usually use in similar cases. This rule, imposing upon it the highest degree of care, applies, however, only to those means and measures of safety which the passenger must of necessity trust wholly to it, and is, in general, applicable only to the period during which it is in a certain sense the bailee of the person of the passenger. But this degree of care is required of all passenger carriers in reference to the movement of a train at a station, as well as on the road; for over such movement the passenger has no more control in the one case than in the other, and must trust wholly to the carrier, as he does when sitting in the car as to the rate of speed or any other matter affecting his safety. The transit of a passenger cannot be considered as ended until he has left the car. *Texas etc. R'y Co. v. Miller*, 308.
21. **WHETHER RAILWAY PASSENGER MUST BE ASSISTED IN ALIGHTING FROM CAR QUESTION FOR JURY WHEN.** — The question whether or not the failure of the employees of a railway company to assist a female passenger laden with bundles in alighting from a car is a want of that measure of care which the company owes to her as a passenger, is one to be determined by the jury upon a consideration of all the circumstances in the particular case. *Texas etc. R'y Co. v. Miller*, 308.
22. **INJURY TO MAIL AGENT TRAVELING IN MAIL-CAR, LIABILITY OF RAILWAY COMPANY FOR.** — A railway company is liable for injury received



by a mail agent while traveling in a mail-car, by reason of the negligence of its servants, where the contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car. *Gulf etc. Ry Co. v. Wilson*, 345.

22. **MAIL AGENT ON RAILWAY TRAIN TO BE REGARDED AS PASSENGER.** — A mail agent lawfully on a railway train, and entitled to transportation, is to be regarded as essentially a passenger, and entitled to recover for an injury resulting from the negligence of the company or of its servants, whether the company is compensated for his transportation by the charge for the car, or for the transportation of the property of which he has charge, or receives no compensation whatever for his carriage. *Gulf etc. Ry Co. v. Wilson*, 345.
24. **RAILROAD COMPANIES HAVE NO RIGHT TO PRESCRIBE THE DRESS OF ANY PASSENGER.** *South Florida R. R. Co. v. Rhodes*, 506.
25. **CARRIERS OF PASSENGERS — REASONABLENESS OF RULES** prescribed by railroad companies and like corporations is a question of law to be decided by the court, and not by the jury. *South Florida R. R. Co. v. Rhodes*, 506.
26. **CARRIERS OF PASSENGERS — UNREASONABLE RULE.** — A rule prescribed by a railroad, inhibiting passengers from wearing on its cars the uniform caps and badges of the employees of another line of carriers, is not a reasonable rule. The expulsion of a passenger simply for wearing such cap or badge is illegal, and he is entitled to damages therefor. *South Florida R. R. Co. v. Rhodes*, 506.
27. **CARRIERS OF PASSENGERS — EXPULSION OF PASSENGERS.** — A statute providing that a railroad company, in ejecting a passenger for non-payment of fare, must do so at a usual stopping-place or near some dwelling-house, applies only to passengers who have not paid their fare. Passengers, for any other violation of the reasonable rules of the company, may be expelled at any convenient and safe point selected by the officer in charge, no more force being used than is necessary. *South Florida R. R. Co. v. Rhodes*, 506.
28. **CARRIER OF PASSENGERS — EXPULSION OF PASSENGER — EXCESSIVE DAMAGES.** — Where a passenger is unlawfully expelled from a railroad train, without malice or more force than is necessary to effect his expulsion, a verdict for five thousand dollars damages therefor is excessive, and should be set aside. *South Florida R. R. Co. v. Rhodes*, 506.
29. **CARRIER OF PASSENGERS — SUFFICIENCY OF COMPLAINT AGAINST.** — A complaint in an action by a passenger against a railroad company for wrongfully expelling him from a train need not allege that at the time of his expulsion he was complying with the reasonable rules of the company, nor that he was not about to violate them. *South Florida R. R. Co. v. Rhodes*, 506.
30. **NEGLIGENCE, SUFFICIENT ALLEGATION OF, IN COMPLAINT.** — A complaint which alleges, in substance, that the railway car in which the plaintiff was traveling was derailed through the negligence of the railway company and its servants, and that thus the plaintiff was injured, is sufficient, without stating the particular acts of negligence which caused derailment of the car and the injury to the plaintiff. *Gulf etc. R. v. Wilson*, 345.
31. **NEGLIGENCE, QUESTION OF, TO BE DETERMINED BY JURY.** — Where an injury to a passenger on a railway train results from derailment of the train by running upon a calf upon the track

the fact that the company has the right to fence its track, it is for the jury to determine whether or not the company was negligent. *Duty etc. Ry Co. v. Wilson*, 345.

22. SLEEPING-CAR COMPANY is answerable to plaintiff if its servants failed and neglected to awake the plaintiff and his wife in time to enable them to dress and get off the train at the station of their destination, and caused plaintiff and his wife to get off the train at a water-tank half a mile from the station, before daylight, on a damp, cold morning in February, where they were compelled to stand for a long time in the rain, mud, and cold, not knowing where the station was, the train having moved off before they ascertained that the station had not been reached; and plaintiff's wife was made sick and her health permanently impaired by the exposure; and plaintiff was forced to provide medical aid for his wife and to pay for the same, to remain away from his home to attend to her, and suffered much mental anguish on account of her condition. *Pullman P. Car Co. v. Smith*, 356.
23. SLEEPING-CAR COMPANY, DUTY AND LIABILITY OF, TO PASSENGERS. — Where a sleeping-car company undertakes to furnish sleeping accommodations to passengers, such accommodations being under its exclusive control, and receives compensation therefor, it is its duty to awake and notify passengers in time for them to prepare to safely and comfortably leave the train at the place of their destination; and if it fails to perform this duty, and injury results, it will be liable therefor, although the railway company might also be liable. *Pullman P. Car Co. v. Smith*, 356.

See AGENCY, 7; CARRIERS; CONTRACTS, 15; NUISANCE, 4, 5; TRIAL, 4.

### RAPÉ.

1. INCEST — EVIDENCE. — Evidence showing the commission of rape will not sustain a conviction under an indictment charging incest alone. *State v. Jarvis*, 141.
2. INCEST. — Rape by forcible ravishment, and incest, cannot be committed by the same act, as incest is accomplished by the concurring assent of two persons, while rape is committed through the impelling will of one. *State v. Jarvis*, 141.
3. RAPE — EVIDENCE. — Rape and incest are two distinct crimes, and while evidence of the violence used in the commission of the former is admissible, such evidence is not admissible under an indictment charging the latter crime alone. *State v. Jarvis*, 141.

### RATIFICATION.

See AGENCY, 5.

### REAL PROPERTY.

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## **RELIGIOUS SOCIETIES.**

**CHURCH SOCIETY, BY INCORPORATING,** does not lose its existence or become wholly merged in the corporation. *Lilly v. Tobbsen*, 337.

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## **RIOT.**

**RIOT, RESISTANCE TO.** — A RIOT IS ALWAYS REGARDED IN LAW AS A DANGEROUS OCCURRENCE, and it is impossible to conjecture or ascertain beforehand to what extremities of lawlessness or crime the excitement or confusion may lead. A private person, who cannot otherwise suppress or defend himself from rioters, may justify or excuse the use of fire-arms or other deadly weapons, because it is both a right and a duty to protect one's self and family and to aid in preserving peace. *Higgins v. Minaghan*, 423.

**See ASSAULT.**

## **SALE.**

1. **SALE BY SAMPLE — PAROL EVIDENCE.** — When a contract is in writing, and nothing therein indicates that a sample was used or referred to, parol evidence is not admissible to show a sale by sample. *Harrison v. McCormick*, 469.
2. **SALE BY SAMPLE — PAROL EVIDENCE — PLEADING.** — Where a contract sued on appears to be complete in itself, but its execution is denied, and it is alleged that the contract of sale was by sample, parol evidence showing that the goods delivered were not of the kind or quality named in the contract is inadmissible, in the absence of allegations that the contract was induced to enter into the contract alleged by fraudulent representations, or of mistake in reducing the contract to writing. *F. McCormick*, 468.

2. **SALE UNDER CONTRACT — ADMISSION OF EVIDENCE OF SALE BY SAMPLE PREJUDICIAL ERROR.** — Where, in a suit on a contract of sale which appears complete in itself, and contains nothing to indicate that a sample was used or referred to in making it, the court finds that the goods delivered were of the kind and class named therein, but fails to find that they were not merchantable, nor equal in quality to those called for in the contract, the admission of parol evidence to show a sale by sample, and that the goods delivered did not correspond therewith, and judgment was for defendant, is reversible error. *Harrison v. McCormick*, 469.
4. **WARRANTY. — A SALE OF GOODS BY A PARTICULAR DESCRIPTION OF QUALITY** implies a warranty that the goods are or shall be of that description. *Morse v. Moore*, 783.
5. **WARRANTY. — ACCEPTANCE OF GOODS, THOUGH THE CONTRACT OF SALE WAS EXECUTORY**, does not prevent the vendee from recovering for a breach of warranty of the quality of such goods. *Morse v. Moore*, 783.
6. **WARRANTY. — FOR A BREACH OF WARRANTY OF QUALITY, WHETHER THE SALE IS EXECUTIVE OR EXECUTORY, THE VENDOR HAS THREE REMEDIES** against the vendor: 1. The right to reject the goods if the property has not passed to him; 2. A cross-action for damages for the breach; and 3. The right to plead the breach in defense of an action by the vendor, so as to diminish the price. *Morse v. Moore*, 783.
7. **EXECUTORY CONTRACTS OF SALE — ACCEPTANCE OF GOODS WHICH WERE SOLD BY EXECUTORY CONTRACTS** raises a presumption that they correspond with the goods agreed to be delivered, and affords some evidence of a waiver of any defect of quality, if such is shown to exist; but the presumption is not conclusive, and may be rebutted by evidence that the vendee objected at the time, and notified the vendor of the alleged defect, or, though the vendee was silent, that he did not waive his right to insist on the warranty of quality. *Morse v. Moore*, 783.
8. **BREACH OF WARRANTY AS DEFENSE TO ACTION ON NOTE — RESCISSION.** — In an action to recover on a note given to secure payment for a farming implement, and containing a condition that "no promise or contract outside of this note will be recognized," the defendant and maker of the note may allege and prove that the implement was sold under a warranty that it was sufficient for a particular purpose, which warranty wholly failed, and that he offered to return the implement, and rescinded the sale. *Gale Sulky Harrow etc. Co. v. Stark*, 739.
9. **RESCISSIION — BREACH OF WARRANTY.** — Where a farming implement sold under a warranty is materially different from what it is warranted to be, and will not serve the purpose for which it is warranted, the vendee may return it and rescind the sale, notwithstanding that the note which he gave to secure the payment of the purchase price contains a provision that "no promise or contract outside of this note will be recognized." *Gale Sulky Harrow etc. Co. v. Stark*, 739.

See COMMERCE, 2; MUNICIPAL CORPORATIONS, 11-27.

#### SCHOOLS.

1. **SEPARATE SCHOOLS FOR WHITE AND COLORED CHILDREN.** — The constitution and laws of a state, providing separate schools for colored children only, are not forbidden by or in conflict with the fourteenth amendment to the federal constitution, and the fact that they have to go a greater distance to school than white children does not give them any actionable cause of complaint. *Lehew v. Brummell*, 895.

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2. **SEPARATE SCHOOLS FOR WHITE AND COLORED** — Statute and laws of a state which do not allow children of color to attend from the public schools, and which give them no privileges afforded white children, merely for the purpose of receiving instruction, deprive them of the purpose of receiving instruction, deprive them of but reasonable regulations of the exercise of the right. *Brumwell*, 805.

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1. **A CLAIM FOR UNLIQUIDATED DAMAGES** for a tort set off against another claim of the same character. 804.
2. **JUDGMENT RENDERED IN ANOTHER STATE** — A judgment rendered by the defendant because of the limitations of such state is conclusive against the state of an action for the same matters which would be used as a set-off. *Weeks v. Harriman*, 21.

See **VENDOR AND PURCHASER**

### SHERIFFS.

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See **MUNICIPAL CORPORATIONS**

### SLANDER.

1. **WORDS ACTIONABLE PER SE — INFAMOUS OFFENSE** — A person who has committed an infamous offense is actionable per se for slanderous words which are punishable by imprisonment for a charge that one has committed perjury is actionable per se. *Penland*, 73.
2. **PRIVILEGE, WHEN MATTER IN DEFENSE** — Words which are slanderous per se were uttered in the course of a trial and were relevant and pertinent to the issue. The fact that they were privileged must be set off as a defense. The fact is affirmatively alleged in the complaint.
3. **COMPLAINT** — Where a complaint in slanderous words were spoken in a judicial proceeding and the slanderer was prosecutor in such proceeding, the fact that he sought protection against his liability. *Gudger*.
4. **COMPLAINT — PRIVILEGED COMMUNICATIONS** — A complaint for slander, is not required to negative the fact that the slanderous words were uttered under such circumstances as would be protected on the ground of privilege.
5. **COMPLAINT — JUDICIAL NOTICE** — Where a complaint is filed with sufficient certainty that defendant charged

sworn to a lie when examined as a witness in a certain criminal court at a certain term against certain persons, the appellate court will take judicial notice of the court mentioned, and that it had jurisdiction. *Gudger v. Penland*, 73.

6. COMPLAINT — SPECIFICATION OF SLANDEROUS WORDS. — A complaint in slander need not set forth the language or substance of the testimony delivered by plaintiff as a witness at a trial, and referred to by defendant as constituting false swearing, unless the latter, when uttering the slanderous words, specified what plaintiff did swear, or in what particulars his testimony was false. *Gudger v. Penland*, 73.
7. COMPLAINT — PRAYER FOR DAMAGES. — In an action of slander, a separate demand for damages need not be appended to each allegation setting up a cause of action. *Gudger v. Penland*, 73.

### SLEEPING-CAR COMPANIES

See RAILROAD COMPANIES, 32, 33.

### SOVEREIGNTY.

See STATES.

### SPENDTHRIFT TRUST.

See TRUSTS, 3, 4.

### STALE CLAIMS.

See EQUITY, 3, 4, 5.

### STATES.

1. CONSTRUCTION OF STATUTE. — THE STATE IS NOT BOUND BY GENERAL WORDS in a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. *Mayrhofer v. Board of Education*, 451.
2. STATE PROPERTY EXEMPT FROM SEIZURE. — A general law providing remedies for private individuals will not be construed as intended to enable a creditor of the state to seize its property for the satisfaction of his debt. *Mayrhofer v. Board of Education*, 451.
3. CONFLICT OF LAWS. — IF THERE IS NO RIGHT TO RECOVER for an injury in the state or territory where it was inflicted, there can be none in any other state. *Hoklorman v. Ford*, 734.

See FISHERIES, 2-4; MECHANIC'S LIEN, 2.

### STATUTE OF FRAUDS.

See CONTRACTS, 7-10; VENDOR AND PURCHASER.

### STATUTES.

1. CONSTRUCTION OF. — THE MEANING OF THE LEGISLATURE MAY BE EXTENDED beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, and the purpose which was designed. *Bennett v. American Express Co.*, 774.
2. GAME LAWS, POWER OF LEGISLATURE TO ENACT, IN EXERCISE OF POLICE POWER. — A state legislature has power to enact laws for the preservation of game in the state, and the constitutionality of such legislation

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cannot be questioned. The power to legis-  
the police power inherent in each state.  
641.

3. **POLICE POWER — STATUTORY CONSTRUCTION** authorizes an exercise of police power in subjects which are not as well as those power, the exercise of the power will be the legal subjects of such power. *Jackson*
  4. **POLICE POWER — SUBJECTS OF, HOW DETERMINED** final judges as to what are proper subjects of police power, and the legislature cannot arbitrarily from its nature is not so. *Jacksonville v. L*
  5. **A STATUTE WHICH SELECTS PARTICULAR LOCALITY** and subjects them to peculiar or special obligations or burdens, from which locality are exempt, is unconstitutional. *Jacksonville v. L*
  6. **LICENSE FEE** cannot be imposed upon persons of a particular class or profession are exempt under similar conditions. *State v. Hinman*, 22.
  7. **TWO DISTINCT SUBJECTS** are not expressed in the title "An act to regulate the manufacture, of explosives, and to punish an improper use of such use necessarily implies the right to regulate the manufacture of explosives." *Hronek v. People*, 652.
  8. **A STATUTE DOES NOT TREAT OF TWO SEPARATE SUBJECTS** if one part relates to the manufacture and sale of explosives, and the other part to their manufacture for legitimate purposes. *Hronek v. People*, 652.
  9. **THE TITLE OF AN ACT DOES NOT EXPRESS THE SUBJECT** when it, in addition to the general subject of manufacture of explosives, which, without such expression, was within the general subject. *Hronek v. People*, 652.
  10. **THE TITLE OF AN ACT NEED NOT EXPRESS THE SUBJECT** if it expresses the general subject of manufacture of explosives, and the subdivisions germane to the general subject in it. *Hronek v. People*, 652.
- See ANIMALS**, 1, 2; **CARRIERS**, 3, 19, 20; **COMMERCIAL**, 1, 2; **DENTISTRY**; **IMPRISONMENT**; **MARRIAGE AND DIVORCE**; **CORPORATIONS**, 7; **STATES**, 1, 2; **TOWNS**; **WATERS**, 1, 2.

### STATUTORY OFFENSES

**See CRIMINAL LAW**

### STOCKHOLDERS.

**See CORPORATIONS.**

### STREET-RAILROAD COMPANIES

**See RAILROAD COMPANIES**

### STREETS.

**See MUNICIPAL CORPORATIONS.**

## SUBAGENTS.

See INSURANCE, 20.

## SUBROGATION.

See INSURANCE, 30, 31; SURETY, 2.

## SUBSCRIPTION.

See CORPORATIONS.

## SUNDAY.

See TAXATION, 4.

## SURETYSHIP.

1. **RIGHT OF SURETY TO STAND UPON STRICT TERMS OF HIS OBLIGATION.** — A surety has the right to stand upon the strict terms of his obligation, when such terms are ascertained, and his liability is not to be extended, by implication, beyond those terms. But this rule of strict construction in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are primarily determined, but merely limits their liability strictly to the terms of their contract, when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms. Contracts of suretyship are to be construed by the same rule as all other contracts. *Shreffler v. Nadelhoffer*, 626.
2. **SURETY HAS NO RIGHT TO REQUIRE THE CREDITOR TO SATISFY HIS DEMAND OUT OF THE PRINCIPAL'S PROPERTY**, rather than out of that of the surety. *Morrison v. Citizens' Nat. Bank*, 39.
3. **SUBROGATION.** — A SURETY'S RIGHT TO SUBROGATION TO SECURITIES held by his creditor is subordinate, and not superior, to the rights of the latter; he has no right to be put in a better position than his creditor, and cannot have the benefit of a security without assuming the burden to which it is subject. *Morrison v. Citizens' Nat. Bank*, 39.

See OFFICE AND OFFICERS, 3-5.

## SURVEYS.

- AN EXCESS OR DEFICIENCY** in the length of a block of land, which is, according to a plat thereof, divided into a number of lots, should be apportioned among the several lots in proportion to their respective frontages as indicated by the plat. *Pereles v. Mageon*, 339.

## TAXATION.

1. **ASSESSMENT OF CITY LOTS IN BULK.** — Town lots, though in the same block and contiguous and belonging to the same person, should be separately assessed; but when the owner lists and values such lots in bulk for the purpose of assessment, this will be deemed a consent, and will estop him from complaining that the assessor did the same in making the assessment. An assessment so made will not be set aside. *Kissim-see City v. Drought*, 546.
2. **VALIDITY OF REDEMPTION NOTICE.** — A notice for the redemption of land sold for delinquent taxes, which gives one day more than the three years allowed for redemption, is not invalid on its face. *Hicks v. Nelson*, 709.



3. **SUFFICIENCY OF REDEMPTION NOTICE.** — A notice to redeem land sold for delinquent taxes which gives the date of sale, from which the expiration of the time for redemption may be computed, is not invalid for uncertainty or indefiniteness in fixing the final day for redemption. *Hicks v. Nelson*, 709.
  4. **REDEMPTION NOTICE, WHEN WILL SUSTAIN DEED.** — Where notice for the redemption of land sold for delinquent taxes gives one day more than the three years allowed by statute for redemption, and the last day named in the notice is Sunday, a deed of the land following the notice will not be set aside, in the absence of a showing by the owner that he was misled by the notice, and that he offered to redeem on the last day named therein, or if the last-named day was Sunday, on the next day. *Hicks v. Nelson*, 709.
  5. **TAX DEED DOES NOT PASS TITLE WHEN.** — A tax deed which is not executed with the prerequisites of the law authorizing its execution does not pass any title; but a deed for the property, sufficiently describing it, properly acknowledged and recorded, without the existence of any authority upon the part of the tax collector, may become the basis for the acquisition of a title under the five years' statute of limitations. *Fowler v. Simpson*, 370.
- See **COMMERCE**, 2; **HIGHWAYS**, 1, 2; **INJUNCTION**; **MUNICIPAL CORPORATIONS**, 26.

## TENANTS IN COMMON.

See **CO-TENANCY**.

## TORTS.

See **PARENT AND CHILD**, 1, 2.

## TOWNS.

- STATUTE AUTHORIZING PAYMENTS BY MUNICIPAL CORPORATION.** — A statute authorizing a certain township to vote bonds to repay citizens of such township money advanced by them to aid in the construction of a county court-house is constitutional and valid, though but for such statute the citizens making such advances would be without legal means of redress. *Board of Commissioners v. Snyder*, 742.

## TRADE-MARKS.

1. **IN WHAT MAY BE ACQUIRED.** — A person may acquire the right of a trade-mark in his own name or in the name of any person, but he cannot acquire it in the use of his own name, to the exclusion of the right of another person having the same name, and whose place of business is in the same place. *El Modello Cigar Mfg. Co. v. Gato*, 537.
2. **IN WHAT MAY BE ACQUIRED.** — One may establish his right to a trade-mark in the name of a place, city, or town; and when he manufactures his goods at a particular place, and uses the name of that place in combination with other words, as a trade-mark, to distinguish the ownership of his goods, no other person will be permitted to name of the same place upon goods manufactured by him at different place. *El Modello Cigar Mfg. Co. v. Gato*, 537.
3. **INFRINGEMENT OF.** — When one uses his own name to distinguish the origin and ownership of his goods, manufac-

- ticular place, no other person by the same name will be permitted to use his name on his own goods under such circumstances as are calculated and designed to enable him to represent his goods as and for the goods of such other, so as to injure the trade and business of the latter. *El Modello Cigar Mfg. Co. v. Gato*, 537.
4. **INFRINGEMENT — PRESUMPTION.** — When a trade-mark is calculated to deceive, even if no one has been actually deceived, an intention to deceive will be presumed; and though there may be no intention to deceive, one will not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them will injure the latter. In such case an injunction will be granted. *El Modello Cigar Mfg. Co. v. Gato*, 537.
  5. **MEASURE OF DAMAGES FOR INFRINGEMENT.** — One whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious article, and also damages resulting from such violation. He is entitled to nominal damages for the violation of his trade-mark, without proof of actual damages, or that the spurious articles were inferior to his own. *El Modello Cigar Mfg. Co. v. Gato*, 537.
  6. **INJUNCTION — LACHES.** — Lapse of time will not deprive the owner of a trade-mark of the right to an injunction against an infringer, if he has exercised reasonable diligence in asserting his rights; nor will mere acquiescence in the wrongful use of his name estop him from asserting his rights, unless he has notice, during such acquiescence, of the facts rendering the use of his name wrongful. *El Modello Cigar Mfg. Co. v. Gato*, 537.
  7. **INJUNCTION.** — LACHES OF COMPLAINANT WILL NOT AVAIL as a defense in a proceeding to restrain the use of a trade-mark, when the defendant adopted the mark with a fraudulent intent. *El Modello Cigar Mfg. Co. v. Gato*, 537.
  8. **IMITATION OF UNPATENTED ARTICLE — INJUNCTION.** — The manufacture and sale of an unpatented article, made in exact imitation of another manufacturer's product, will not be enjoined, in the absence of allegation and proof of a trade-mark. The bronzing of horse-shoe nails does not of itself constitute a trade-mark or patent. *Putnam Nail Co. v. Delaney*, 228.

### TRESPASS.

1. **TRESPASSER WITHOUT TITLE CANNOT SET OUT AN OUTSTANDING TITLE** in another. *Anderson v. Gray*, 696.
2. **TRESPASSER WITHOUT TITLE TAKING POSSESSION OF PROPERTY CANNOT SUCCESSFULLY DEFEND** an action to eject him by showing that the sheriff's sale under which the plaintiff held possession was invalid. *Anderson v. Gray*, 696.

See CARRIERS, 11; NEGLIGENCE, 8-10.

### TRIAL.

1. **IT IS IMPROPER, ON AN EXAMINATION OF A JUROR ON HIS VOIR DIRE**, to permit him to be asked whether he had a prejudice for or against *charivari* parties, or against persons engaged in *charivaring*, though the action is to recover damages for the shooting of the plaintiff while he and others were engaged in giving the defendant a *charivari*. *Higgins v. Minaghan*, 428.

2. **PREJUDICE AGAINST A CRIME.** — JUROR IS a person accused of a particular crime by t against such crime. *Higgins v. Minnigh*
3. **ORDER OF EVIDENCE** is within the sound may even open the case for the purpose. *Kansas City v. Bradbury*, 731.
4. **RIGHT TO DISMISS AS TO ONE PARTY** TO sues both a railway company and the com may dismiss as to the conductor at any where the facts do not show that he was of weakening the effect of his evidence if fendant. And the fact that defendant's dismissal until some time after the trial *Co. v. Miller*, 308.
5. **COURTS — POWER TO CHANGE CONCLUSION JUDGMENT.** — The judge of the court, or any time before the entry of judgment, upon the facts found; and in an action of clusively assumed that the judgment as and upon a proper showing. *Crim v. Ke*
6. **INSTRUCTIONS ASKED AFTER THOSE GIVEN** issues in the case are properly refused.
7. **SPECIAL INSTRUCTIONS REPEATING PRINC CHARGE ARE PROPERLY REFUSED.** At 350.
8. **SPECIAL ISSUES INSUFFICIENT TO AUTHOR** answered, ought not to be submitted to t *Miller*, 308.
9. **THE COURT MAY INSTRUCT THE JURY TO F PARTY**, when it is plain that a contrary stand. *Moore v. McKenney*, 753.
10. **VERDICT FOR DEFENDANT MAY BE DIRECT** evidence to support the plaintiff's cause c close of the plaintiff's case, direct the j *Rolen v. Chicago etc. R'y Co.*, 585.
11. **REFUSAL OF INSTRUCTION.** — Where a ti structions asked by one or both of the pr its own, the latter must fairly instruct tions involved in the case, and it must i ferred by the losing litigant by the refus him. *Wacaser v. People*, 683.
12. **REASONABLE DOUBT.** — The court should "a reasonable doubt is one which arise: consideration of all the evidence, and w of life would cause a prudent and rea pause." *Wacaser v. People*, 683.
13. **VERDICT FINDING DEFENDANT GUILTY, B** is sufficient, though three defendants ar ment, if the record shows that but one *Hronek v. People*, 652.
14. **SUBJECT FOR COMMENT BY COUNSEL.** — ness, who was present at a conversation ant's agent concerning the subject-matte **AM. ST. REP., VOL. XXIII — 64**

and not called to contradict plaintiff, is a legitimate subject for comment by counsel, who may argue therefrom that plaintiff should be believed. *Grubbs v. North Carolina Home Ins. Co.*, 62.

See ANIMALS, 2; APPEAL AND ERROR; DEPOSITIONS; PLEADING, 8.

### TROVER.

1. THAT THE DEFENDANT ACTED AS AN AGENT OR SERVANT of another does not furnish any justification in an action of trover. *McPheters v. Page*, 772.
2. CONVERSION, WHAT IS. — Any distinct act of dominion wrongfully exerted over property in denial of or inconsistent with the owner's right amounts to a conversion. It is not necessary that the wrong-doer apply the property to his own use, if he has exercised dominion over it in exclusion of, or in defiance of, or inconsistent with the owner's right. Hence if officers seize meat without authority, take it to a market, where a butcher, at their request, cuts it into steaks and roasts, and lets one of the officers have paper to do pieces up to distribute round to his friends, such butcher is guilty of conversion, though he neither uses nor sells any of the meat. *McPheters v. Page*, 772.
3. PROOF OF VALUE IS UNNECESSARY in an action of trover, when the answer alleges that it is not of greater value than a specified sum, and the recovery was for a sum less than that thus admitted. *Hage v. Campbell*, 422.

### TRUSTS.

1. EXPRESS TRUSTS. — STATUTE OF LIMITATIONS does not begin to run in cases of express trusts until a repudiation of the trust. *Fox v. Tay*, 474.
2. APPLICATION OF FUNDS. — Where a trustee receives any portion of the funds from a transaction, he must personally see to the application of them. He cannot pass them over to his co-trustee for investment or distribution; and if he does, he will be personally responsible for the acts and defaults of such trustee. *Fox v. Tay*, 474.
3. SPENDTHRIFT TRUST — VALIDITY OF, AS AGAINST CREDITORS. — A grantor cannot create a spendthrift trust making himself or herself the sole beneficiary for life, with power to dispose of the trust property at death, so as to subject neither the income nor the corpus of the estate to the payment of his or her debts. *Ghormley v. Smith*, 215.
4. SPENDTHRIFT TRUST — VALIDITY OF, AS AGAINST CREDITORS. — Where an unmarried woman, not in contemplation of marriage, creates an irrevocable trust in her own property, for her own benefit for her life, without liability for her debts or contracts, and with power to dispose of it at death, the trust is void as to her creditors, and they may subject the income of her property to the payment of their claims. *Ghormley v. Smith*, 215.

See CORPORATIONS, 12, 15, 16; EXECUTORS AND ADMINISTRATORS, 1, 2; GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 1, 3, 4.

### USURY.

UNACCRUED INTEREST DOES NOT MAKE CONTRACT USURIOUS WHEN. — Where a note payable in five years contains a stipulation that, upon failure to pay any one of the interest coupons, the whole sum of money shall become due and payable at the option of the holder, unaccrued interest

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cannot be regarded as coming within the  
lation, so as to make the contract usurious

See **BROKERS, 2; INTEREST, 1.**

## VARIANCE.

See **EXECUTION, 9; JUDGMENT, 1.**

## VENDOR AND PURCHASER.

1. **PAROL CONTRACT OF INDEMNITY — ENFORCEMENT OF TITLE.** — A parol contract by a vendor to indemnify the vendee on a failure to give title, and to repay all the purchase-money is not merged in a deed subsequently executed with a special warranty, but no covenant of title. deed, and confers an independent cause of action for failure of the title. *Close v. Zell*, 296.

2. **PAROL CONTRACT FOR SALE OF LAND — FAILURE OF TITLE.** — Where, under a parol sale of a lot of land, the vendee has paid part of the purchase-money, and the lot is subsequently measured, but there is a failure of title to the extent of an honest mistake by the vendor as to the measurement, the vendee may rescind, or may recover the purchase-money he may recoup damages for the loss of one foot to which he was entitled under his contract. *Eyrick*, 287.

3. **PAROL CONTRACT FOR SALE OF LAND — FAILURE OF DAMAGES.** — Where, under a parol contract for the sale of a lot containing fifty front feet, there is a failure of title to the extent of an honest mistake as to the measurement of damages to which the vendee is entitled, the purchase-money, is the relative value that the part to which the title failed bears to the whole lot as estimated with regard to the whole. While the peculiar advantage of the part lost with reference to the whole may be of the purchase, still the additional expense incurred on an adjoining tract, incurred by reason of the failure of title, in order to have the reasonable and proper portion of the land, must not be considered. *Tyson v. Eyrick*, 287.

See **AGENCY, 1, 3, 4; COVENANTS; MORTGAGES, 1.**

## VERDICT.

See **TRIAL, 13.**

## VICE-PRINCIPAL.

See **MASTER AND SERVANT, 13.**

## VOLUNTEERS.

See **MASTER AND SERVANT, 13.**

## WAGERS.

1. **BETTING ON HORSE-RACE GAMING, AND CONTRACTS THEREON.** — Betting money on a horse-race is gambling.

law, and a contract in aid of the offense of gaming is void and cannot be recovered upon. Where, therefore, one person advances money to another to be used by them as partners in the business of betting on horse-races, he cannot recover back the money so advanced. *Shuffner v. Pinchback*, 624.

2. **LAW REFUSES AID TO PARTIES IN PARI DELICTO.** — If persons engage in an unlawful business, such as betting on horse-races, in such a manner as to be in *pari delicto*, the law will not aid either of them, but will leave them in the positions in which they have placed themselves. — *Shuffner v. Pinchback*, 624.

See BROKERS, 1; CONTRACTS, 1-6.

#### WAIVER.

See DEPOSITIONS; INSURANCE, 21-23, 47.

#### WARRANTY.

See COVENANTS; SALES, 4-9.

#### WATERCOURSES.

See FISHERIES; NEGLIGENCE, 14-16; RAILROAD COMPANIES, 9, 10.

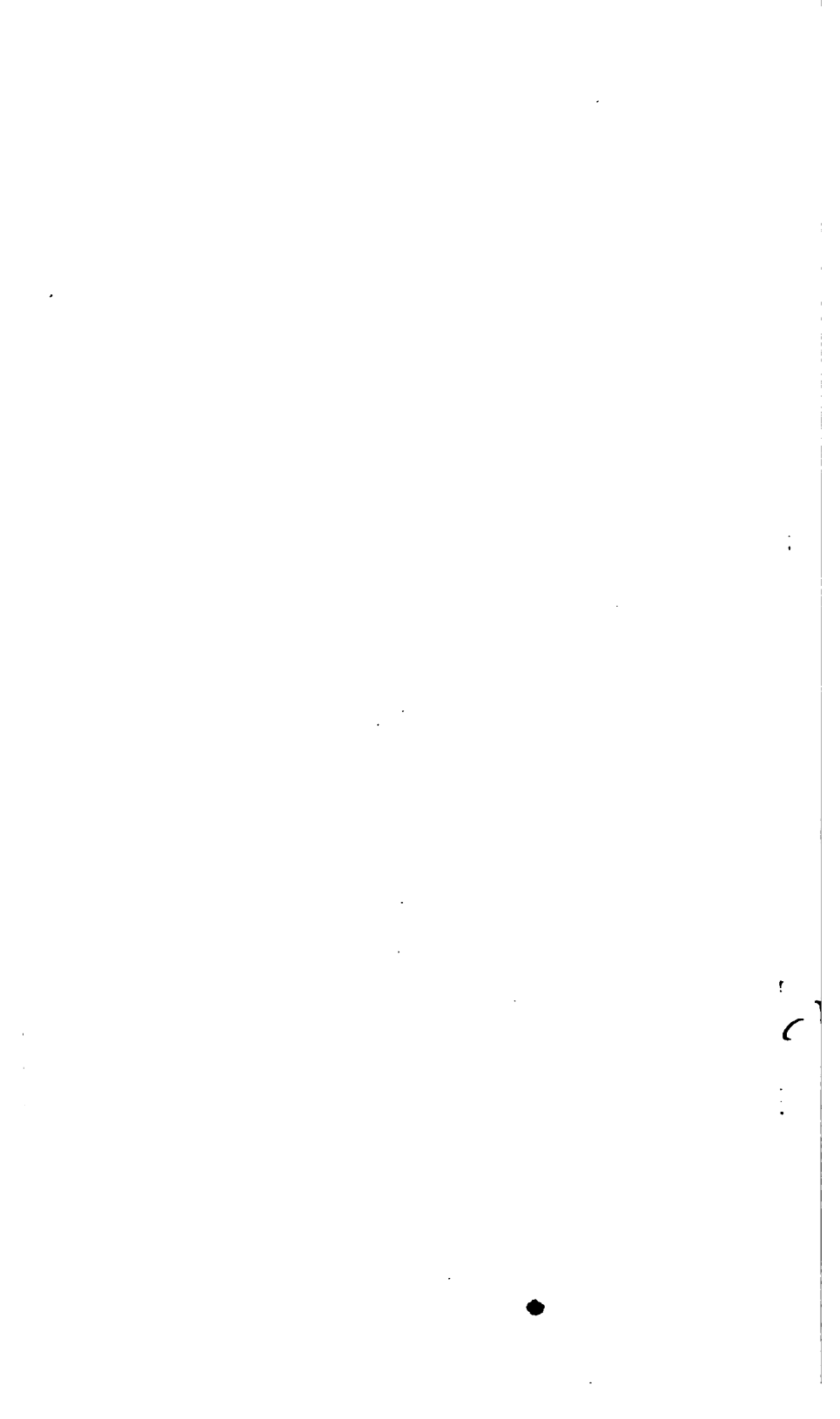
#### WIDOW.

See LEGACIES, 1.

#### WILLS.

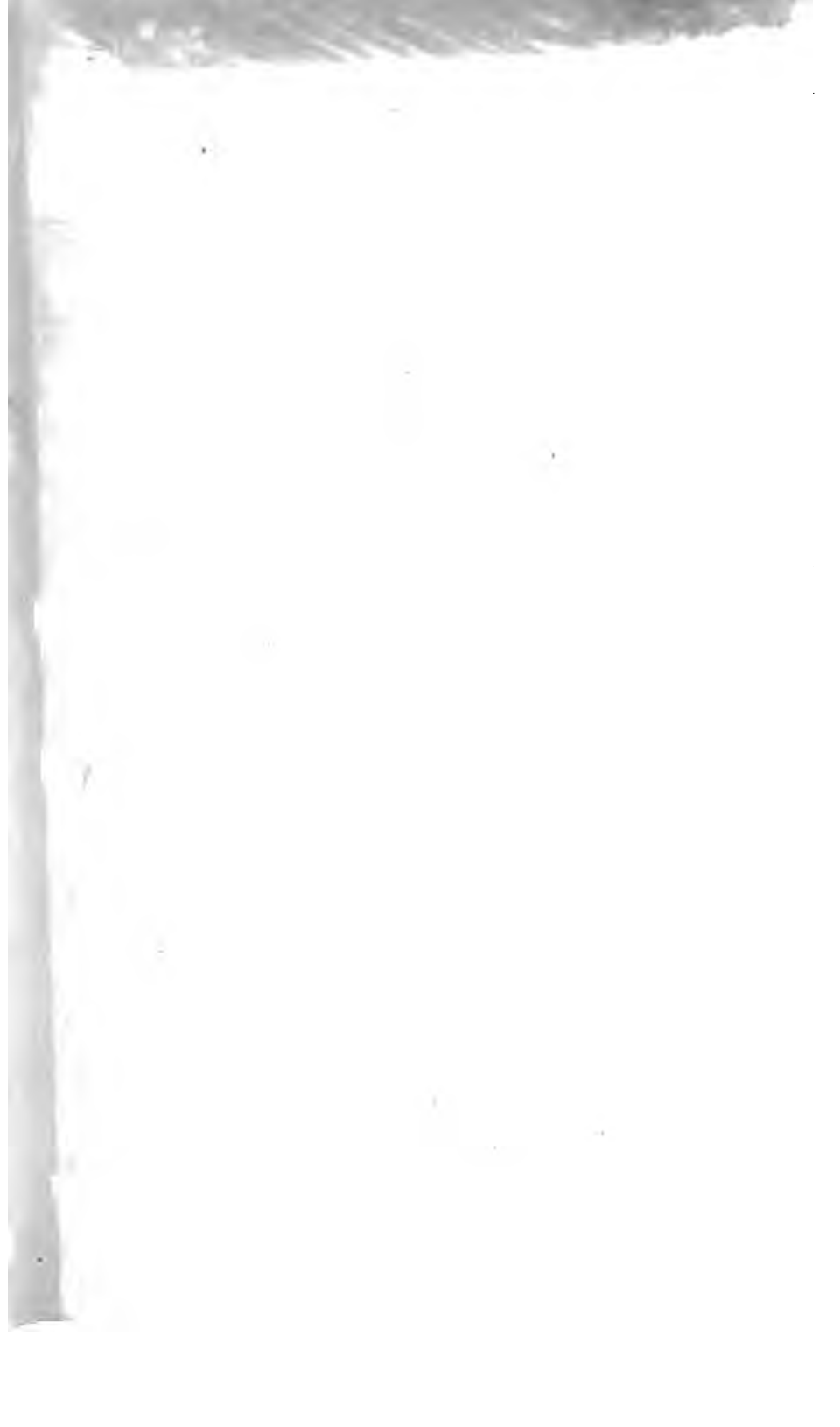
1. **ACTION TO ESTABLISH — PARTIES.** — An action to establish a rejected will, although technically a proceeding at law, has many of the features of a suit in chancery, and the equity rule allowing one or more members of a voluntary association to sue for all applies in such case. *Lilly v. Tobbein*, 387.
2. **ACTION TO ESTABLISH — ISSUE.** — The question whether a devise to a church can or cannot be enforced cannot be decided, in an action to establish a rejected will. Such question can be determined only after the instrument is established as the will of the testator. *Lilly v. Tobbein*, 387.
3. **ISSUES IN ACTIONS TO ESTABLISH.** — In a suit to establish a rejected will, the only issue is, whether or not the writing is the will of the testator, and in passing upon this issue the court will not construe the will nor decide its legality. If a particular clause has been inserted by fraud or forgery, the court may reject it as no part of the will; but if such clause is found to be part of the will, the whole must be probated, although such clause cannot be enforced. *Lilly v. Tobbein*, 387.
4. **JUDGMENT REFUSING TO PROBATE WILL,** on the ground that the plaintiff is not a competent party in interest to prosecute the suit, is not a bar to another suit in which competent parties are plaintiffs. *Lilly v. Tobbein*, 387.
5. **DISINHERITANCE OF HEIR.** — An heir at law can only be disinherited by an express devise or by necessary implication, and such implication must amount to such a strong probability that an intention to the contrary cannot be supposed. *Estate of Jacobs*, 230.
6. **CONSTRUCTION — LAND MAY PASS AS MONEY.** — Where it appears from a will that the testatrix did not intend to die intestate as to any part















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